MISSISSIPPI LAW JOURNAL

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MYRES S. MCDOUGAL
(1906 -)

A LIFETIME OF ACHIEVEMENT

TRIBUTE TO MYRES S. MCDOUGAL

Justice Byron S. White[*]

On January 11, 1966, I came to The University of Mississippi School of Law on Lucius Quintus C. Lamar Awards Day to help honor the distinguished Yale Law School professor Myres Smith McDougal, who became the first Lamar Fellow. The careers of these two great men, both with roots in Mississippi, were quite different. Lamar was the Congressman, Senator, statesman, and the only United States Supreme Court Justice appointed from this state. Myres McDougal, who easily could have followed the same route, instead became without doubt the preeminent legal scholar to hail from Mississippi. Never forgetting his heritage, he at one time predicted he would return to his home state upon his retirement and divide his time between farming and scholarship.

This remarkable educator was born in this state in 1906, graduated from this University in 1926, earned a master's degree in 1927. In the process, he was an instructor in the Greek and Latin language courses. For a time he was also a football coach. It seemed that he was headed for this law school when he was awarded a Rhodes Scholarship. He spent three years at Oxford, where he earned degrees in Jurisprudence and Civil Law—both with first class honors, which is no mean feat. He later became an honorary fellow at St. John's College. It was at Oxford that James Brierly, a noted authority in international law, interested McDougal in that field. McDougal came to Yale as a Sterling Fellow in 1930 and

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[*] Associate Justice of the Supreme Court of the United States (retired).

taught at Illinois for three years before returning in 1934 to Yale, where he taught until his retirement in 1975, 41 years later. He was the Townsend Professor of Law from 1944 to 1958 and Sterling Professor of Law from 1958 until 1975.

While teaching at Chicago during the summer of 1935, he met Harold Lasswell, a political and social scientist who thought that law should be more attuned to policy than current jurisprudes would have it. The two men became friends and colleagues and over the years founded what became known in some circles as the New Haven School of Jurisprudence. Lasswell became a lecturer at Yale, and in 1939 the two offered a seminar dealing with property, a subject that McDougal had taught for years. My first year at Yale Law School was 1939; I took Property I from McDougal as well as sitting in on the McDougal-Lasswell seminar. That year was by far the most demanding and exciting intellectual challenge I ever experienced; and, later, Future Interests *a la* McDougal was pure fun. I was very taken with McDougal as a teacher. He was experienced, skillful, and had taught a range of subjects. He very obviously loved teaching and being with his students, in and out of the classroom.

The War interrupted many endeavors. I had two years of credit at Yale when I joined the Navy; my third and final year was an accelerated one—January to September, 1946. McDougal was also absent for a period of time, doing several jobs in Washington. The McDougal-Lasswell enterprise was on hold, except for the 100-page, jointly authored article in the Yale Law Journal, *Legal Education and Public Policy: Professional Training in the Public Interest*, published in March of 1943.[1] That article, observing that the War's down-time provided an opportunity to take stock, called for the reform of legal education, discussing at length how and why this should take place. It submitted this basic proposition: "if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be

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[1] Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

conscious, efficient, and systematic [*training for policy-making.*]"[2] "Policy" for McDougal and his friend Lasswell was the making of important decisions which affect the distribution of values. "What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility."[3]

The authors never gave up on this view of legal education. The 1943 article was attached as an appendix to a long-awaited book published in 1992, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy,* which Lasswell and McDougal also wrote. In reviewing this book Richard Falk observed:

> In some sense, McDougal and Lasswell conceive of legal education less in terms of vocational training and more as a means of producing enlightened citizens capable of understanding the issues of the day as a struggle to realize the values of human dignity. Thus, they seek through their jurisprudence a dynamic of political engagement needed to achieve and sustain a free society.[4]

In 1946, while finishing my last year at Yale, I became acquainted with the 1943 article, with its call to arms for lawyers. Professor Falk had it right.

The joint venture of McDougal and Lasswell proved lasting and productive. Their seminars expanded in scope and, by 1955, were entitled "Law, Science and Policy: the Jurisprudence of a Free Society and World Community and Law." By that time, as evidenced by a Faculty Profile published in the Yale Law Report,[5] the pair was known best for proposing and teaching in seminars and published writings a new system of jurisprudence: the policy-science approach under which authori-

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[2] *Id.* at 206.

[3] *Id.* at 207.

[4] Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1993 (1995).

[5] Vol. 1, No. 2.

tative decisionmakers create and apply rules guided by the perspectives of their communities. The approach seeks to identify and analyze the values sought and effected in making decisions (as well as other factors going into the process of law). The profile reflects that, as McDougal became seriously interested in international law, he demonstrated that the policy-science approach could be applied in this field as well as property, including future interests. Furthermore, for some years, McDougal had been in charge of the graduate program, which had been expanded to include teachers and students from many nations. This, not surprisingly, was one of McDougal's enthusiastic interests. McDougal, the profile observed, called more students by their first names than any other professor. They, in turn, regarded him highly.

His devotion to teaching complemented his commitment to scholarship. Professor McDougal published three books on property prior to 1950:

- Municipal Land Policy and Control (Practicing Law Inst. 1946);

- Directive Comm. on Regional Planning, The Case for Regional Planning with Special Reference to New England (1947) (Chairman of the Comm., with M. Rotival); and

- Property, Wealth, Land: Allocation, Planning and Development (1948) (with associates).

Between 1943 and 1960, this prolific scholar, either alone or in collaboration, also wrote thirty-three articles developing his theory of international law; authored eight reviews of works by other authors; wrote five articles on property-related subjects; and finally, wrote five articles, in addition to the 1943 Yale Law Journal piece, addressing legal education. All, in one way or another, advanced his policy-oriented jurisprudential views.

After 1960, McDougal wrote the following six books on international law:

- Studies in World Public Order (1960) (with associates);

- Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961) (with F. Feliciano);

- The Public Order of the Oceans: A Contemporary International Law of the Sea (1962) (with W. Burke);

- Law and Order in Space (1963) (with H. Lasswell & I. Vlasic);

- The Interpretation of Agreements and World Public Order (1967) (with H. Lasswell & J. Miller); and

- Jurisprudence for a Free Society: Studies in Law, Science, and Policy (1992) (with H. Lasswell).

Also, after 1960, Myres McDougal wrote at least thirty-eight articles (including chapters in books, proceedings, and congressional statements) by himself. The topical breakdown of these articles is as follows: (1) twenty-five of these addressed international issues (including many on outer space!); (2) six concerned legal education; (3) two combined these interests, addressing international legal education; (4) two were tributes; and (5) the final three were about more general legal interpretation.

McDougal's talents and efforts were not confined to scholarship. In 1958, this busy professor was president of the Society of the American Society of International Law, was honorary president for four years in the 1970s, and was awarded the Society's Hudson medal in 1976. He was also of counsel to the Saudi Arabian government in the Aramco arbitration during 1955–1956. In addition, McDougal served as President of the Association of American Law Schools in 1966 and was a member of the United States Panel of the Permanent Court of Arbitration from 1963 until 1969.

On Saturday, April 26, 1975, 350 persons gathered in the Yale Commons to honor professor Myres McDougal, who was retiring two months later. President Ford was on hand, and sixteen different countries were represented by current or former students of the professor. Among the gifts of appreciation bestowed upon him was a book of letters, singing his praises, written by former students from all over the world. Dean Goldstein observed that Mac's Property I enterprise involved "no less than reshaping the entire field of property to encompass the new policy, planning and decision-making perspectives." This undertaking, the Dean said, required boldness, great energy and vision, and the love of intellectual adventure. Former Dean Rostow referred to his colleague of many years as "a gifted man, a whole man, and an altogether remarkable scholar." The Dean also remarked about the obvious close relationships between the Professor and his students. These students from all over the world, the Dean said, use the McDougal analytical system with respect and admiration. They do not, however, consider him a guru, but rather a teacher, friend and colleague.

Richard Falk, Millbank Professor of International Law and Practice at Princeton University, studied under McDougal and, as indicated above, reviewed the monumental *Jurisprudence for a Free Society*, published in 1992. He states in his review that he adheres generally to McDougal's jurisprudential outlook, but has sharp disagreements in some respects. In summing up his review, he had this to say:

> There is no doubt in my mind that immersion in the McDougal and Laswell jurisprudence is beneficial from many standpoints: student, scholar, policymaker, and judge. It softens predispositional bias and fills in many of the gaps found in conventional wisdom. As such, it provides an invaluable pedagogic tool that has proven useful, even formative, for several generations of students who have attended the Yale Law School, and then moved on to a variety of careers.
> Further, it is a prodigious intellectual achievement. The sheer magnitude of the scholarly endeavor is quite overwhelming. Only a seasoned weightlifter could carry the McDougal and

> Lasswell corpus. More deeply, the integrity of seeing the world clearly from a single vantage point provides a kind of moral certification of lifelong dedication to the pursuit of "truth." Their sustained commitment, especially given the subject matter, stands in contrast to academic work that follows trends or headlines and adds up to nothing in the end. Whatever else, McDougal and Lasswell have established a clearly contoured presence in writings about law, especially international law.[6]

This dedication highlights the enormous scholarly achievements of Professor McDougal in creating the New Haven School of Jurisprudence and International Law. Analysis of its jurisprudence, critical and otherwise, I leave to the experts. Mac has had an enormous influence on the law. Just as impor-

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[6] Falk, *supra* note 4, at 2007. In 1965 Professor Falk had this to say about McDougal's jurisprudence:

> I would argue that the stylistic criticism is unfounded. McDougal strives to achieve clear and precise expression. His sentences are almost always impossible to improve upon. Their complexity stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude. McDougal, with the substantial help of Harold D. Lasswell, is engaged in the formidable task of developing and applying a jurisprudence that takes *systematic account* of all aspects of social reality relevant to the processes and structures of making *rational* decisions about legal policy alternatives. This is a complicated endeavor and requires an elaborate intellectual apparatus. It would not occur to anyone to complain about Einsteinian theories of physical reality on the ground that they were abstruse and not readily susceptible to lay understanding. Well, it is time that we appreciate that theories about social reality are also likely to be comparably complicated if they are to render service. Our expectations seem quite wrong. Why should a reader be entitled to grasp McDougal's ideas on international law without special effort and training? We confront an insidious form of anti-intellectualism whenever we meet the argument that legal analysis must be carried on in a fashion that requires its meaning to be evident to the uninitiated or hurried reader. All that it is proper to demand is that legal analysis bring added knowledge and understanding to the adept. McDougal and Feliciano over-fulfill this demand.

Richard A. Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT'L L. 66, 70-71 (1965).

tant, he is greatly admired and loved by his students in this country and abroad.

REMARKS OF MYRES S. McDOUGAL*

Myres S. McDougal

Friends, it is an extraordinary pleasure, especially upon an occasion like this, for me to be back at Ole Miss. Happily, because of good health, I have been able to travel widely both in this country and abroad. I have never, however, found a place that I like as much as Ole Miss. I appreciate the presence of you all. I would especially thank my old friend, Chancellor Robert Khayat for his invitation and support of this occasion. I also express my deep appreciation to two long-time friends: Jean Swift, with whom I have been co-lawyer in several cases, going back many years, for the State of Mississippi, and Judge James L. Robertson, the son of one of my favorite classmates, Susie Mae Lawton, and a past and probable future justice of the State of Mississippi.

My name is Myres Smith McDougal. I spent two years of my life at Burton, Mississippi and Louisville, Kentucky, while my father, Dr. Luther Love McDougal, was finishing up his medical studies. My father began the practice of medicine at Burnsville, Mississippi, once a rich agricultural area. My mother's (Lulu Bell Smith) oldest sister, Amy, lived in Burnsville. Her husband, "Big Ed" Timbes, was the principal citizen of Burnsville. He owned or operated everything. One of the younger Timbes daughters and I were the same age. We liked each other and were inseparable playmates. Unhappily, when we were about seven, our families moved away to different places. Among the duties assigned to Helen and me in Burnsville was that of looking after her little brother, Wilburn. We would put him into an automobile tire, swing

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* These remarks were given at a Mississippi Law Alumni Banquet honoring Myres S. McDougal with a Lifetime Achievement Award on March 23, 1996.

and turn him around until he was ill and his mother had to take him back. You know Wilburn as Bill, a successful businessman in Tupelo. Happily, he is here today and none the worst for wear. One of his sons-in-law, David Sparks, has been most helpful to me in finding lost important papers, including a statement of my membership in the State Bar Association.

I first arrived at Ole Miss as a student in the fall of 1922. I, had however, visited Oxford many times. My mother's youngest brother, Walker Smith, was a respected citizen of the community and had two sons, Myrl and Hassell, which whom I liked to visit. Myrl was a crackshot with a rifle and we shot raccoons on a nearby farm. Happily, Hassell's widow, Jane Smith, and stepson, Professor Roy Hunt of the University of Florida Law School in Gainesville, are here today.

In 1922, Ole Miss was a community, but a very small community. As I remember we had overall about 450 students and about 50 teachers, including all departments. Joseph Neely Powers was the Chancellor, but he was shortly succeeded by Alfred Hume, a strong teacher of mathematics. Professors Milden, Bondurant, Kennon, and Bishop were the great teachers. Professor Milden was the Director of admissions. I wanted to teach and made three efforts filling out cards to get courses to teach. In a third effort, I filled out the cards for science courses. When the cards came back again, I settled for Latin and Greek. Soon I was teaching classes here in the Lyceum of 100 in freshmen Greek. I remember still saying to one student: "Miss Dogan do you have your book open." She replied that she did. She was turning the page with her toes.

The Law School was small with some 30 students and 6 professors. Judge T.C. Kimbrough was a strong, firm dean. He and I were good friends. I once asked him if I could shorten the three-year course if I didn't get the Rhodes Scholarship. His reply was that I would be lucky if I could get the degree in three years. Once in a class with Judge D.M. Russell I referred to "punnitive" damages. The judge immediately snapped at me: "Mr. McDougal, the word is "punitive." Robert Farley, whose family had helped create the School, taught a course (my first in law) in agency. The class counted him in

300 "ahs" during the hour. John Fox, who had an LL.B. from Yale, was a later teacher and dean. Many years later my nephew, Luther McDougal, III was a member of the faculty. It is said that he left for a position at Arizona because he didn't like the way black students were treated at Mississippi. He was bringing suits for the federal government to promote integration in Mississippi but was a little too successful. He was ordered to return to the faculty. He refused and went to Arizona. He is now a name professor at the Tulane University in New Orleans. My son, John Lee McDougal, attended Ole Miss for one term as a law student. He withdrew to go to the University of Virginia Law School in order to be close to the centers of the Lee family of Virginia. Through his mother, he is a member of that family.

One amusing event occurred when John Fox was a dominant figure on the faculty. The deanship was vacant and John Fox was insisting to the faculty that he didn't want the job. Through Judge Clayton, I could influence the appointment. I came to Oxford and found John in a hospital. I asked him how he felt and whether he wanted the job. His reply was: "Don't be a fool. You know I want it." Shortly thereafter he was made dean. At one time, Josh Morse brought six Yale graduates to teach at Ole Miss. I still think that it was a tragedy that he left to go to Florida.

In 1927, Rhodes Scholars were selected by committees of former Rhodes Scholars, chaired by the Chancellor of Ole Miss. When my candidacy came up, the Committee was composed of two former scholars from Millsaps College in Jackson and two from Southwestern College in Memphis and the Ole Miss Chancellor. My principal competition for the scholarship was John Satterfield from Millsaps, who was later president of the American Bar Association. The two Millsaps professors voted for Satterfield. The two Southwestern professors voted for me. Chancellor Hume broke the tie in my favor. When I went by to thank him, he said: "Mr. McDougal when I needed a friend, you were my friend. I figured you needed a friend." What he was referring to was an issue of *The Mississippian* student newspaper. Members of the state legislature were

much opposed to the teaching of the doctrine of evolution and put the blame on the Chancellor for its teaching. As editor of *The Mississippian*, then a weekly, I printed an issue of the paper and took it to Jackson to attack them. For some reason I still don't understand, the legislators decided to let Hume alone and he lived in peace as Chancellor for some years.

I was happy that Booneville High School's Mrs. D.A. Hill, the wife of the Superintendent of the school, had prepared me well in Latin for both Ole Miss and Oxford University. I discovered that I could compete in Latin with the best of the English students.

At Ole Miss I was not an outstanding student. Though I was listed in the University catalogue as an instructor in Latin and Greek; I never made *Phi Beta Kappa*.[1] You will be glad to know, however, that Ole Miss prepared me well for Oxford, England. With me, as a classmate and fellow Rhodes Scholar at Oxford, was Hugh Cox, already a graduate of Harvard Law School. It was gossip among the Rhodes Scholars at Oxford that Cox and I had made the highest grades in law during a six-year period. We both took what the English call a "double firsts." Cox's grades were a little better than mine and he got a prize of 500 pounds.

My tutor at Oxford was Sir William Holdsworth, the great legal historian. He treated me like a son. At parties at his home (under Folly Bridge, across the Thames), I met many famous English lawyers. At the end of my three years at Oxford, Holdsworth advised me to go into teaching and said that he would write to Dean Charles Clark of Yale for me. At that time, American Legal Realism was beginning to sprout at Yale and Columbia. The Yale people thought that my Oxford training resembled a little too much of Harvard and farmed me out to the University of Illinois for three years. Dean Clark and several members of the faculty told me that I sounded a little too much like a Harvard man. At a meeting of the American Association of Law Schools, I attacked Professor Joseph Beale, the great poobah of Harvard. Clark and several other Yale

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[1] I was not aware that there was no chapter then available at Ole Miss.

professors, including Wesley Sturges, told me that I was ready to return to Yale.

Wesley Sturges was one of the great influences of my life, as was George Dession, an instructor in criminal law. He was one of the most promising of the young Yale scholars but unhappily died of a heart attack in Denver. George Dession was my closest friend until his death. Unhappily, I had told him that I did not think he could escape from a written obligation to go to Denver. Dession told me that I was in for a hard year. Indeed I was. Sturges gave me a going over every day, but I could never find a case that he had not read. I woke up one morning with the equivalent of a religious conversion. "Why," I said to myself, "the son of a bitch is right." He was very much surprised when he called on me that morning. From that morning on, we were very close friends. Later I helped make him dean and supported him as dean.

Underhill Moore and I had next door offices for many years and I watched his efforts to apply scientific method to the study of law. Shortly before his death, he told me that he knew that he had failed completely and that his ambition had been wrong.

In more recent years, my closest associates have been Harold Lasswell, Michael Reisman and Andrew Willard. We have published a two-volume (1500 pages) book styled, "Jurisprudence For A Free Society: Studies in Law, Science and Policy."[2] This includes the lectures that Lasswell and I gave over a forty-year period. The final book upon which we are working now will particularize the approach to the global process of effective power.

I met Lasswell in the summer of 1935 when I was a visiting professor at the University of Chicago. At breakfast one morning, I read a review in the *New York Times* by John Chamberlain of the family store in New Haven. Chamberlain wrote, "This is a great book. I can't understand it, but there must be people who can." At Chicago the names of professors

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[2] HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

are posted on class room doors. I noticed the name "Lasswell" on the door opposite me. When I finished my class, I stepped in the back of Lasswell's room and he was applying psychoanalytical theory and techniques to the autobiography of H.G. Wells. I listened with great attention. After the class I went up and introduced myself as a visiting member of the law faculty. His reply was (at 10 o'clock in the morning), "Would you like to have lunch?" After a four-hour lunch, we were friends for life. He told me that he didn't like Bob Hutchins. One of my first publications in the *Yale Law Journal* had been a nasty review of Hutchins' first book.[3] I could understand why Lasswell would not wish to stay in an institution of which Hutchin's was head.

Unhappily, Lasswell died an early death. Since his death, Reisman and Willard and I have been working on an application of the same general approach to the global process of effective power. I tell my collaborators that I am sure they will carry it to completion whatever happens to me.

I would like to express a special word of appreciation to Ms. Cheryl DeFilippo, who has been my administrative assistant during the past 13 years. She is a superb thinker and writer and is responsible for much that we have been able to do. I am sure that she will see the final book through to publication even if she has to write it herself.

Let me conclude by repeating that I feel deeply honored by your words and presence. No place could mean more to me than Ole Miss. Your attention has been deeply appreciated.

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[3] Myres S. McDougal, *Book Review*, 46 YALE L.J. 1433 (1937) (reviewing THE HIGHER LEARNING IN AMERICA: LECTURES ON THE STORRS FOUNDATION (1936) by Robert Maynard Hutchins).

MYRES S. MCDOUGAL: ARCHITECT OF A JURISPRUDENCE FOR A FREE SOCIETY

"no more a person
Now but a whole climate of opinion
Under whom we conduct our differing lives."
—Auden

W. Michael Reisman[*]

A few names stand out for their contributions to our understanding of law and its relation to social processes: Aristotle, Thomas Aquinas, Montesquieu. Myres Smith McDougal, the founder of the New Haven School of Jurisprudence, is a member in full standing of that small club. Indeed, future generations will view his contribution as even more important than those of his illustrious predecessors, for, in addition to analysis and insight, McDougal brings a luminous vision of the objective of law that is to inform each particular decision: human dignity.

There will surely be many biographies of Myres McDougal, which will explore the transformation of a shy and, initially frail, youngster into the powerful figure who has played such an important role on the world stage. We can essay only a few brush strokes here. Myres Smith McDougal was born in 1906 in the farming community of Burton, Mississippi. His father was a country doctor and something of a local political boss. McDougal's childhood blended close, trusting family ties with prudent cautions against the machinations of

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[*] Hohfeld Professor of Jurisprudence, Yale Law School. These remarks were made at the Law Weekend Banquet on March 23, 1996 in Oxford, Mississippi. Part of them have been drawn from an earlier appraisal of Myres McDougal. *See W. Michael Reisman, Myres McDougal*, 18 INT'L ENCYCLOPEDIA SOC. SCI. 479 (1979).

strangers, and these early impressions seem to have become tenets of McDougal's thought, in his emphasis on the importance of stable relationships on which one can rely, the human agency in political organization, the continuous relevance of power, and the practical importance of learning. But the bucolic picture of the childhood of a Mississippi farm boy that McDougal himself has sometimes cultivated, was something of a myth. McDougal's earliest years moved between Northern Mississippi and Louisville, Kentucky, as his father completed his studies at the University of Kentucky, then one of the four major medical teaching centers in the United States. Thereafter, McDougal's father often took advanced courses in Chicago during summers and the family would accompany him. Young Myres spent one summer with an uncle who had settled in Alaska and, as a teenager, McDougal, traveled widely in the South and Southwest to county fairs, as a member of a competitive team judging cattle. In these contests, McDougal attributed his success more to an understanding of human beings than of cows.

Nor, myths aside, was it the happiest of childhoods. This was a South still traumatized by the Civil War, its economy still slumping and, much of its inner spirit captured in the houses its people inhabited. As they decayed, people did little to repair or extend them. As for young Myres, his childhood was disrupted by frequent moves by his father, as his father's medical practice expanded and he moved to ever larger towns.

McDougal's father wanted him to enter state politics and become a U.S. senator. After attending local schools, McDougal studied classics and then law at the University of Mississippi, earning a B.A., M.A., and LL.B. After a brief stint teaching Latin and Greek at the University of Mississippi, he devoted his academic career entirely to law. As a Rhodes Scholar, he studied law at St. John's College, Oxford, came under the influence of W.S. Holdworth, and received his B.C.L. in 1930. Though invited to teach at Oxford, he elected to return to the United States to take his doctorate in 1931 at the Yale Law School.

McDougal arrived at Yale in 1930, trained in a formal

Positivism that viewed law as a body of rules and principles and that employed a method of rudimentary, though often elegantly expressed, syntactics not advanced yet to even the crude and exaggerated empiricism of C.C. Langdell's case method. Yale was then the center of Legal Realism, a diversified jurisprudential movement, most of whose members sought to annihilate positivism, expose rules as camouflage, and reveal law as no more than decisions of human beings who responded, with varying degrees of consciousness, to political, economic, psychological, and even organic stimuli. Holmes, in one of his most famous apothegms, had said that "Law is nothing more pretentious than the prediction of what courts will in fact do." The Realists successfully demonstrated that by reference to rules alone, neither scholar nor practitioner could explain why past decisions had been made nor how future decisions were likely to be made. The Realists were much less successful in identifying the tasks the jurist should perform and the methods to be deployed.

In 1935, McDougal became associated, quite fortuitously, with Harold D. Lasswell, and the two began a close collaboration, more productive than the great collaborations of Marx and Engels or Parsons and Schills, to name only two. McDougal was instrumental in bringing Lasswell to Yale and in 1943 they published "Legal Education and Public Policy,"[1] their first joint exposition and one of the most quoted and cited law review articles ever published in the United States. Lasswell's insistence on contextuality, his wide-ranging and creative use of methodology, his psychoanalytic applications, and his refined conception of power, combined with his problem-solving orientation, provided myriad points for common interest and collaboration.

During World War II, McDougal worked in the Departments of State and Justice and in the Lend-Lease Administration, an experience that gave him first-hand knowledge of the

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[1] Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

methods of mobilization, manipulation, and control in modern society. He was greatly influenced by Oscar Cox, the chief lawyer for Harry Hopkins. The Lend-Lease experience rekindled, among other things, McDougal's interest in international law, dormant since he had studied with James L. Brierly at Oxford. Thereafter, he devoted more and more time to what he called the public order of the world community.

McDougal was never the model of the retiring scholar. At different times he was active in politics at the state and national levels, and he took keen interest in the power struggles that often seem to be the *raison d'être* of scholarly organizations. He served as president of the American Society of International Law and of the Association of American Law Schools, was active in the American Law Institute, and was elected to the Institut de Droit International. He was counsel in two major international arbitrations, represented the United States at diplomatic conferences and was counsel for the United States in the *Nicaragua* case before the International Court of Justice. He advised corporations and foreign governments and actively supported many human rights initiatives. Upon retirement from Yale in 1975, he taught briefly at Temple University, in Philadelphia, as a visitor, and then established himself at New York Law School, where he taught for an additional ten years, commuting each week from New Haven, where he also continued to maintain an office and to see students.

His relationship to his students was close, usually dominating, always protective. One of his most famous students, Richard Falk, in a long review essay and reminiscence of McDougal, published in the *Yale Law Journal* in 1995, commented at length on the sheer force and magnetism of McDougal's personality and the "spell" that he cast on his students.[2] Perhaps less known is the fact that McDougal reserved a special concern for students from Mississippi who came to Yale College or the different graduate schools. Each

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[2] Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995).

September, he would invite them all to a lunch where, some of them have subsequently recounted, he would patiently explain how to behave "up North." Like McDougal's law students, many of these students came to view him as their mentor and regularly repaired to his spacious office in the Sterling Law Building for advice or career counseling. McDougal followed closely the careers of many of his students who achieved high positions in the United States and abroad and frequently consulted him.

McDougal's key areas have been property law, jurisprudence and international law, but many of his monographs have also made recognized contributions to constitutional law and legal education. With the exception of his innovative property law casebook,[3] most of the work he did before his fifties was monographic. His major collaborative treatises in international law were all produced after that period, and in his view represent the application of his matured theory to major problems. His *oeuvre* is enormous, a fact due as much to his energy as to his capacity to attract gifted younger scholars in collaborations on which his intellectual imprint is always evident. He was able to work simultaneously on several projects, each with a separate team. This influence has been further extended by the work of many students who wrote under his strict supervision in virtually all fields of law.

Many of his early international monographs were events in themselves, prompting rebuttal and often angry debate. His work on the lawfulness of testing hydrogen bombs over the Pacific, a detailed study of the basic traditional policies governing the law of the oceans applied to a novel use, was immediately attacked. His theories on aggression and self-defense, now widely accepted, occasioned angry debates at the American Society of International Law. Part of the excitement and antagonism may have derived from the issues he chose; he always wrote on topical and explosively controversial subjects, for he was concerned with the application of law to current

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[3] MYRES S. MCDOUGAL & DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1948).

problems. Although he explored all issues thoroughly, he always reached conclusions about the lawfulness of contemporary acts that many colleagues rejected. His methodology stung some, for it focused not on rules and their logical interrelations, but on claims and decisions, the latter tested by their contribution to all the public policies raised in that particular instance. This was a distinctive approach, and McDougal insisted that it be viewed not merely as an alternative, but as the only meaningful way of approaching law. He set out in detail and with fairness the theories, methods, and conclusions of others, but indicated with precision where he differed and why he believed they were wrong. Being criticized by McDougal was not an experience easily forgotten. Lasswell, his life-long collaborator, wrote:

> McDougal was not one to be turned aside by an obstacle course. If a mountain persisted in standing in the way, McDougal took his intellectual bulldozer and knocked it down. His furious tenacity left the bones of many 'irresistible' objects strewn among the footnotes.[4]

McDougal's focus has two main components—the relevant communities to be studied and the conception of law to be deployed. McDougal insists on a globally comprehensive conception of community, for his work is premised on the interdependence of the entire earth-space arena in which people interact. A corollary of this premise is that efforts to understand or influence decisions cannot succeed without keeping that interdependence in mind. In his community focus, he insists that processes of effective power as well as those of authoritative decision be incorporated. Both of these focal elements represent radical departures from traditional jurisprudence. Positivism and Historicism have tended to be national in focus, even questioning the possibility of law between groups, and while Natural Law theory speaks in universal terms, the content of its focus on community tends to be general and imprecise. Almost

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[4] HAROLD D. LASSWELL & MYRES S. MCDOUGAL, 1 JURISPRUDENCE FOR A FREE SOCIETY at XXXVCI (1992).

all schools of jurisprudence focus only on authoritative decision, the formal institutions of the law, either ignoring processes of effective power or isolating them in closed categories, such as "political question," and then dismissing them as inappropriate subjects for jurisprudence.

McDougal insists that law, the second component of his focus, be conceived as processes of authoritative decision by which people clarify and implement their common interests. This process is investigated by special focal components, some original with McDougal, some incorporated from methodologies of other social sciences. Thus McDougal rejects behavioralism by insisting on a *balanced emphasis on both perspectives and operations*: what people say and think as well as what they do. He rejects formalism by insisting on a conception of law that incorporates both *authority and control*—i.e., the normative expectations of relevant actors as well as their actual participation in decision making. He emphasizes the processes by which the institutions for making indispensable decisions are established, maintained, and changed, but in studying this he dismisses the notion of a constitution as a document, insisting instead on a theory of "constitutive process" in which authority and control actually operate. He distinguishes this *constitutive process* from the *public order* of a community, the aggregate of decisions about the production and distribution of all values *other* than power, and distinguishes in turn, within the public order, a *civic order* or domain of privacy, in which production and distribution are effected through less severe sanctions.

These focal components have been designed with an intellectual task or a humanitarian goal in mind. The distinction between public and civic order is animated by McDougal's concern for the maintenance of private domains protected by the coercive power of the organized community but insulated from its operation. Here McDougal shares concerns with Philosophical Radicals and Liberals and some common ground with writers like H.L.A. Hart. Conversely, a Marxist conception of jurisprudence might consider civic order a bourgeois atavism and a pathological condition in a just society. But many of the other focal emphases are radical jurisprudential revisions. The insis-

tence on an integration of authority and control as prerequisite to a meaningful conception of law is distinctive and may be one of McDougal's major contributions to legal theory. The conception of the constitutive process is almost Copernican in its insistence that many postulates of right conduct in secular societies be tested with full attention to contemporaneous practices, rather than by reference to a totemized text.

McDougal's treatises in international law are rigorous applications of his jurisprudential theory. In each, a careful statement of the factual problem is followed by a comprehensive critical review of scholarship in the area and a postulation of the goals that should guide decision makers if community responses to that resource or practice are to contribute to a public order of human dignity. McDougal then details with great specificity the factual claims with regard to the resource in question and the *aggregate* international decision processes that respond to those claims. The heart of each treatise is a meticulous review of the decisions for each claim, the environmental and predispositional factors that condition those decisions, projections of likely future decisions, and the alternatives thought to give a greater approximation to community goals. The result in each treatise is a picture of the processes that make and apply the law under study, their past and probable future productions, the impact of the decisions on the values concerned, an appraisal of the aggregate performance of the decision process, and recommendations for improved future performance. Legal and social science literature are incorporated and documentation is enormous. The total impact of each book is magisterial.

While McDougal's interest in jurisprudence has been consistent, his shift to international law from the field of property law, in which he worked for 25 years and attained great prominence, is more puzzling. Property law is extremely localized; moreover, the common law variant is a strand in the unique web of English political history and hence shares little with other property law systems. In fact, McDougal's approach to property was radically different from that of his predecessors and exhibits many of the distinctive features that mark his

work in international law. His conception of property was not "land" but the aggregate of a community's spatial resources, and he viewed the function of law as the planning and implementation of the uses of these resources in ways that would optimize the common interests of the community. In cooperation with Maurice Rotival, a planner who had worked in many parts of the world, McDougal wrote a book on planning for a river valley.[5] He published a study of land planning for Connecticut and, with David Haber, a textbook of cases and materials on property law that placed land use in a global context.[6] The book was a popular teaching text, enjoying a long run, but it was so controversial that efforts were made to ban it in two states.

Throughout his career McDougal has been concerned with improving legal education. In 1943, as I mentioned, he published, with Lasswell, "Legal Education and Public Policy."[7]

He argued that one could not speak rationally of professional training without a theory of law and society and a conception of the preferred functions that the lawyer-in-training was to perform in his professional career. He applied his method to these issues, dismissing much of the inherited curriculum as obsolete and inappropriate for professional training in a free society, and suggesting a detailed radically innovative curricular process that might better secure the social objectives he had postulated. The article was widely discussed and republished many times.

For twenty-five years, McDougal chaired the Graduate Program at the Yale Law School and transformed it into an international teachers' training program. Through it, he played a major role in staffing law schools in the United States and abroad and in influencing the choice of deans. He traveled in the United States and abroad frequently, lecturing on legal

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[5] Yale University, Directive Committee on Regional Planning, The Case for Regional Planning With Special Reference to New England (Myres S. McDougal & Maurice E.H. Rotival, Chairmen 1947).

[6] MCDOUGAL & HABER, *supra* note 4.

[7] LASSWELL & MCDOUGAL, *supra* note 2.

education and public policy. He was also an active member of the Association of American Law Schools and served as its president in 1966.

Intellectually, McDougal's perspective incorporates major contemporary concepts in several disciplines. His contextualism finds echoes in Alfred North Whitehead, Ludwig von Bertalanffy, David Easton, and many others. His insistent focus on the individual and on the importance of depth psychology is influenced by Freud. His commitment to social science techniques and to empiricism is contemporary. His theories of purposive decision resemble those in organization theory and in the policy sciences, of which he can be considered a co-founder. His rigorously contextual instrumentalism in social design, a feature traceable to his early work in property law, is Gropian, as is his emphasis on teamwork. His skepticism about objectivity, sensitivity to psychological factors, and commitment to action are recognizable components of the twentieth-century intellectual's dilemma. Yet in the field of legal scholarship, a fortress that has long withstood intellectual change, McDougal's work is utterly distinctive. Although he purports to find the origins of his work in pre-Socratic Greece and in some of the medieval Pandectists, the genealogy is hard to trace.

McDougal's intellectual enterprise is at core a method that yields insights and strategic options. In a profession that charges by the hour and is impatient for results, there is a tendency to overlook the methodological component and to concentrate on the exploitable insights. Virtually every lawyer in the United States knows his name, though many older lawyers still attribute his fame to his seminal work in property law. International lawyers around the world consult his work and respect him. Representatives of his ideas can be found in most leading law schools in the United States, though in many schools his exponents are likely to be considered eccentric by their colleagues.

Some aspects of McDougal's theory, however, have enjoyed wide acceptance. Conceptions of law as a process of decision are common, and policy analysis has become a fixture in much of legal education. Though both of these developments are attrib-

uted to McDougal, he has been critical of the style and method with which they are executed. Despite talk of empirical research in law, much research has merely incorporated various types of economic analysis and transformed them into a neoscholasticism. Lasswell had anticipated such methods of containing innovation, referring, in particular, with his characteristic dry irony, to "rejection by partial incorporation." Yet the overall influence of McDougal's methodology on professional consciousness, if often subtle, is everywhere evident. One can say of McDougal, as W.H. Auden said of Freud in 1939, that "he is no more a person/Now but a whole climate of opinion/Under whom we conduct our differing lives."

Intellectual innovation always generates resistance. In the case of the New Haven school, language may be a factor. Although law as a discipline is notorious for its jargon, there has been great resistance and confusion about some of the metalanguage McDougal created or adopted from other social sciences. Ironically, many of his meta-terms have become common parlance, precisely because they refer to aspects of modern society of concern to law for which there were no terms in the traditional lexicon. Some contend that resistance is due to the absence of a simple manual setting forth his ideas – a "C-student's McDougal" – though he has in fact published a number of short and simple statements and Lasswell produced several widely-read short versions. The engagement of scholarship in contemporary political events, central in McDougal's thought, may also generate resistance, for it challenges the myth of the university's separation from practical life, which has provided it some autonomy. Historically, lawyers have cultivated a comparable technique of self-protection in the notion of the neutral technician, one that McDougal, like many Legal Realists, explodes. McDougal's open partisanship has generally alienated at least one side in a debate and has at times led to the charge that his theory is no more than an apology for American foreign policy.

Basically, this resistance may be less a matter of intellectual comprehension (his ideas are current and consistent with contemporary sophisticated thinking) than of distaste for the

tasks he sets for lawyers. For in the final analysis McDougal demands that lawyers look at phenomena and themselves in a radically different way. Instead of an orderly world of rules and a simple system of logic for their application, he presents a dynamic and shifting process in which certainties are few and the agency and responsibility of the lawyer great. Many of those who enlist in the legal profession may demand precisely the myth of certainty that McDougal has, for all time, undercut.

PROFESSOR MYRES S. MCDOUGAL'S CONTRIBUTION TO LEGAL EDUCATION

Luther L. McDougal III[*]

All law professors contribute something to legal education through their teaching and many through their scholarship, but few make major contributions to legal education. Professor Myres S. McDougal, affectionately known to his friends and former students as "Mac," is one of those very few. Mac contributed to legal education in two different ways. One was by teaching hundreds of students over more than four decades and helping countless of those students obtain teaching jobs at law schools in this country and around the world. This I will refer to as his personal touch on legal education. The other is through his scholarship.[1] I want to focus primarily on one article Mac and Harold D. Laswell, his long-time friend and co-author, wrote in 1943 entitled "Legal Education and Public Policy: Professional Training in the Public Interest."[2] This article is one of the most cited law review articles ever written. This article I will treat as his theoretical influence on legal education. Because his theoretical view of legal education is a backdrop against which his personal touch on legal education rests in part, I will start with a brief discussion of his theoretical influence on legal education.

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[*] W.R. Irby Professor of Law, Tulane University School of Law. B.A., LL.B., University of Mississippi; LL.M. Yale University. The author is Myres S. McDougal's nephew.

[1] A partial list of his writings is found at 84 YALE L.J. 965-968 (1975). The list does not include the book which is the culmination of almost five decades of his work, HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

[2] Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,"* 52 YALE L.J. 203 (1943).

MAC'S THEORETICAL INFLUENCE ON LEGAL EDUCATION

Mac's and Lasswell's article which is more than ninety pages long envisions a major reshaping of the law school curriculum, and this essay will only attempt to give a flavor of the full development found in the article. Mac and Lasswell contend that the curriculum should no longer be shaped around the legal doctrines applicable to particular legal pigeon holes, such as property, contracts, and torts, because they believe that the traditional organization precludes any meaningful policy analysis.[3] Rather they suggest that the law school curriculum should be organized principally around value[4] principles and skill principles.[5] They assert that the object of legal education should be to train policy-makers devoted to democratic values.[6] They define policy very broadly as "the making of important decisions which affect the distribution of values."[7] This, of course, means that much of the work of lawyers is concerned with policy. For example, they believe that lawyers affect policy-making through a range of activities including "advising clients on how to avoid litigation and controversies," "consulting and negotiating with clients, businessmen, opposing counsel, and decision-makers of all kinds," and "selecting courts, juries, arbitrators, negotiators, and other decision-makers."[8] The quoted activities, which are only three of seventeen activities they identified, were selected for inclusion here, because they reflect a role of lawyers that almost all, if not all, law schools ignored until relatively recently. They further assert: "[i]t is incumbent upon law teachers to make plain to the student not only that there are different ways of settling disputes but many ways of getting results other than by disputation."[9] This quote and the identified

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[3] Laswell & McDougal, *supra* note 2, at 232-43.

[4] *Id.* at 247-62.

[5] *Id.* at 262-89. They also briefly discussed an influence principle as another possible way of organizing part of the curriculum. *Id.* at 245-47.

[6] *Id.* at 206.

[7] *Id.* at 207.

[8] Laswell & McDougal, *supra* note 2, at 210.

[9] *Id.* at 263.

activities reflect an early recognition of the need for training law students in what has become known as alternative dispute resolution. Now most law schools have courses in alternative dispute resolution, including negotiation, mediation, and arbitration. Whether this early recognition by Mac and Lasswell of the need for training law students in this area played a role in the ultimate alternative dispute resolution "movement" is conjectural, but the article certainly serves as a major source of academic support for the "movement."

Although Mac and Laswell, think that the skills of legal syntax and persuasive communication which are the focus of traditional law school courses are basic and important skills that must be taught in law school, they do not believe that it is necessary to divide the law school curriculum along traditional doctrinal lines in order to teach those basic skills—cases can be used as a teaching tool no matter how you structure the curriculum.[10] They conclude that in addition to those basic lawyering skills law students should be trained in the performance of a variety of other skills that lawyers use. Skills of thought, observation, and management are the broad other skills that law schools need to teach.[11] These skills should be taught not only in courses and seminars, but also in what are commonly called clinical courses. They observe:

> Very often it has been pointed out that the training of modern students deflects their attention from the factual contexts in which legal technicalities are made functional and that this cannot receive entirely satisfactory correction by providing more fact books. The recommendation is that opportunities be provided for direct contacts with courts, administrative agencies and other parts of our social process. It is desirable that at least brief periods of field experience should occur at different times.[12]

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[10] *Id.* at 243.
[11] *Id.* at 265-89.
[12] *Id.* at 291.

Thus, perhaps to the surprise of some people, the "New Haven" school of jurisprudence as Mac's and Lasswell's theory is sometimes called, thought other skills training was extremely important and, inter alia, recommended the teaching of clinical courses. Again the extent to which this article played a role in the development and offering of clinical courses is unknown. The article certainly serves as an important academic source to rebut frequent assertions by some law professors that clinical courses should not be taught in law schools because the role of legal education is not to teach law students how to be lawyers, only to teach them theoretical analytical skills and legal doctrines. Even though clinical courses are being offered by almost all law schools today, these courses do not teach all of the broad range of skills that Mac and Lasswell believe should be a part of every law school's curriculum.

Perhaps the most important and well-known influence of the article on law schools' curricula is in the development of "law and" courses which Mac and Lasswell advocate in their article. They believe that the study of law without relating the legal process to the social process and the various social sciences is a study of legal doctrines that cannot except accidentally provide meaningful and insightful policy analysis.[13] Only by placing law in context and employing knowledge and techniques of the various social sciences and sometimes the hard sciences can any useful study of law and policy be undertaken. Curiously, some view the development of "law and" courses in the law school curriculum with horror. I heard through the grapevine that at least one professor has blamed Mac for the downfall of legal education because he started the "law and" movement and this diverted students from learning "the law." Such criticism is not surprising because some professors have a very limited view of law and the legal process. They believe

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[13] Lasswell & McDougal, *supra* note 2, at 226, 243. They subsequently summarized their view: "A theory about law which would even approximate relevance will relate authoritative decision not merely explicitly, but systematically, to the larger social process that envelops such decision." LASSWELL & MCDOUGAL, *supra* note 1, at 30.

that law school should be nothing but three years of legal doctrine after legal doctrine after legal doctrine. They simply cannot see the richness that these "law and" courses add to an otherwise dull study of a few more abstract, contextless legal doctrines. The "law and" courses also recognize the varying roles of lawyers in contemporary society.

But the "law and" courses found in law schools' curricula today fall far short of what Mac and Lasswell envision as "law and" courses. For example, a Law and Economics course is found in the curriculum of many law schools today. Although these courses are a step in the right direction, they are limited because they focus on only one of multiple values, wealth. A story I heard about Mac is that not long after Richard Posner published his first book on law and economics[14] a Yale law faculty member was talking about the book at lunch in the faculty dinning room at the law school. The faculty member stated that the book was about the maximization of wealth. Mac simply looked at the faculty member and said "well what does he say about all the other values?"

Mac and Lasswell developed a list of values that were used for convenience in discussion. As ultimately formulated, they were power, enlightenment, respect, well-being, skill, affection, and rectitude, as well as wealth.[15] They postulated the goals of society as those of a free society which are the greatest production and widest possible distribution of all values.[16] To them a law school curriculum should be partially shaped around the study of these values. For example, one of the courses they recommend is "Law and Control."[17] This course would encompass "the study of power, the investigation of how power is distributed, and of how legal syntax, procedures, and structures affect, or can be made to affect this distribution."[18] The course would cut across the traditional courses on Consti-

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[14] Richard A. Posner, Economic Analysis of Law (3rd ed. 1986).
[15] LASWELL & MCDOUGAL, *supra* note 1, at 30-31.
[16] *Id.* at 34-35.
[17] Lasswell & McDougal, *supra* note 2, at 256-57.
[18] *Id.* at 256.

tutional Law, State and Local Governments, parts of International Law and parts of Business Enterprises. Other courses they suggest are Law and Intelligence, Law and Production, and Law and Community Development.[19] All of these would focus on certain values and cover cases found in several traditional courses. The cases would be studied in conjunction with other materials that put the cases in social context and aid a policy-oriented inquiry.

Thus, although Mac and Lasswell spawned the idea of "law and" courses which ultimately found their way into the curriculum of almost all, if not all, law schools, law schools have stopped short of the major changes in the curriculum they envision in their article. In addition, many of the existing "law and" courses fail to perform the five intellectual tasks which Mac and Lasswell think are essential to any meaningful policy-oriented inquiry. These intellectual tasks as ultimately developed are: The clarification of community policies, the description of past trends in decision, the analysis of factors affecting decision, the projection of future trends, and the invention and evaluation of policy alternatives.[20] Mac's insistence on the performance of these intellectual tasks in every course coupled with other aspects of law, science and policy, lead one of his colleagues, Professor Moore,[21] to jokingly state that when Mac shifted from teaching Property to teaching International Law, the only thing that changed was the name of the course.

THE PERSONAL TOUCH

Mac taught hundreds of students over the years at Yale. Many of his students were graduate law students who had come to Yale from law teaching jobs or with hopes of becoming a law professor. Mac was chair of the law school Graduate Student Program for more than twenty-five years and took a special interest in graduate students, both American and Inter-

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[19] *Id.*

[20] LASSWELL & MCDOUGAL, *supra* note 1, at 35-38.

[21] Professor Moore is best known for his multi-volume treatise, JAMES WM. MOORE ET AL, MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE (1962-present).

national. Mac along with other members of the committee reviewed the file of applicants for the graduate program. By the time a graduate student arrived at the Yale Law School, Mac knew who they were and what their background was. He had a knack for quickly putting faces and names together, and could call almost all graduate students by name not long after their arrival. He would meet with most of them to discuss the courses they wanted to take and he thought they should take. Almost all graduate students got to know and like Mac very quickly. Throughout most afternoons (Mac worked at home in the morning and at night and did most of his writing there) there would be a steady stream of graduate students and some undergraduate students to Mac's office for almost any imaginable reason, professional and personal. Hundreds of graduate and undergraduate law students wrote research papers under his guidance in conjunction with one of his courses or as independent research. All of the papers employed policy-oriented inquiry in the Mac and Lasswell mode.

Most graduate students and some undergraduate students took the course Mac and Lasswell co-taught entitled "Law, Science and Policy" which was the course in which they taught their evolving jurisprudential theory. Many also took Mac's international law course entitled "The Public Order of the World Community." The materials for this course and the seminars that developed out of the course were all organized in the law, science and policy manner. His and Lasswell's insights into the legal process discussed in all his courses and seminars highly influenced many of his students. A large percentage of these students taught law school after graduation, and the courses they taught included in varying degrees his and Lasswell's jurisprudential theory. Not only did the theory affect their teaching, it also heavily influenced their scholarship. Some expressly employed the theory both in teaching and writing; others did not expressly follow the approach, but a reading of their works usually reveals that Mac's and Lasswell's theory crept into their analysis. Some stated that they disagreed with the approach altogether, usually on the ground that the theory was too hard to understand because of the metalanguage Mac

and Lasswell developed because they thought existing legal terminology added to confusion, rather than clarification of policies and problems. But in my opinion, many of those who denounced the theory were still influenced by it because they left Yale with a better understanding of the relationship between the legal process and the social process.

Many of the Yale graduate students, and some undergraduate students, would have had a more difficult time finding a law teaching job without Mac's help. He considered that one of his obligations was to help Yale law students, graduate and undergraduate, find jobs in legal education. Over the years he created a nationwide network of deans and law professors, many of whom were former students, who would help him find teaching jobs for this year's crop of Yale law students interested in teaching. He would invite many deans to come and interview at Yale. Each year a substantial number would come to interview that year's crop (as an aside it should be noted that during those years deans played a far larger role in hiring faculty than they do in most schools today). Other deans waited until they and some faculty members could interview the Yale students seeking a teaching job at the annual meeting of the American Association of Law Schools. For years, the annual meeting was held at the Edgewater Hotel in Chicago. This is where Mac was at his very best in lining up students for interviews with law schools. I watched him do this for several years. He would roam the lobby and first floor halls, attend meetings, and go to cocktail parties thrown by various law schools and the association. He was always looking for deans and professors that he knew to see if their school was hiring that year and, if so, what type of person they were looking for. Many of them also sought him out if their school was looking for professors. If they were hiring, he would suggest students to them and then get the students to setup a meeting with the dean or professors from the school. He would also help former students who were interested in changing law schools for whatever reason to find an opportunity at another law school. It would be overstating it to say this is the sole reason Mac loved to "work the convention" because he was also genuinely interested in

seeing former students and other friends he had made over the years in legal education. He wanted to know how they were doing both personally and professionally. Mac genuinely likes people and is a very warm-hearted and sincere person. Almost everyone who knows him thinks of him in these terms. The basic thrust of his personal touch on legal education is that he helped place hundreds of Yale graduates in law teaching over more than three decades. Many of those were, of course, influenced by the Mac-Lasswell school of jurisprudence, and as previously stated their teaching and writing reflected this influence.

Mac has had a special relationship with the University of Mississippi School of Law for almost seven decades. After attending the School of Law before going to Oxford University as a Rhodes Scholar, he subsequently obtained an LL.B. from Ole Miss in 1935. After he became a member of the Yale Law School faculty his relationship with the School of Law continued because for many years most law faculty members of the School of Law attended graduate school at Yale. A whole series of deans followed this pattern over about four decades, including Bob Farley, Josh Morse, Bill Bunkley, and Parham Williams. Another example of that tradition is the present Chancellor of the University, Robert C. Khayat, who took a leave of absence from the law school to earn an LL.M. from Yale.

The height of Mac's and Yale Law School's influence at the University of Mississippi School of Law was in the 1966-67 academic year. About two-thirds of the faculty had undergraduate or graduate law degrees from Yale or had attended graduate school there but never finished their thesis for a doctorate degree. To most members of the faculty this was an extremely exciting and interesting intellectual period at the School of Law. New thoughts and ideas about new courses or the content of existing courses were constantly being discussed by the faculty. Many, although certainly not all, of the thoughts and ideas were from the members of the faculty who had taken one or more of Mac's courses. For that year and the next academic year, it appeared that the law school would be at the forefront

in innovative approaches to a law school's curriculum. Some of the proposals were directly related to Mac's and Lasswell's law, science and policy jurisprudential approach. But major revisions never came to fruition because most of the "Yalees" left the School of Law in the next two or three years for various reasons,[22] and as anybody in legal education knows changing a law school curriculum in any meaningful manner requires that a majority of the faculty be committed not only to change, but to the same changes. Without that committed majority, status quo is the name of the game and the only changes most faculties discuss are what courses should be required, what courses should be taught in the first year, and what additional courses should be taught, including today possibly adding a clinical course or an alternative dispute resolution course. Thousands of hours of law professors' time have been spent on these relatively unimportant decisions about the law school curriculum. Most law professors view proposals for major curriculum changes as heretical, and, thus, the law school curriculum remains basically the same at the University of Mississippi School of Law as it does at all law schools in the country.

Although Mac's and Lasswell's article and Mac's personal and professional relationship with hundreds of law school faculty members around the country for decades has helped in bringing about some changes in the sterile law school curriculum, the major changes suggested by Mac and Lasswell have yet to come. Perhaps, the changes that have occurred suggest that additional changes will be forthcoming in the future. If law schools further develop skills training and value analysis courses as suggested by Mac and Lasswell, perhaps one day law students will find the old adage that law school works you to death in the second year and bores you to death in the third year no longer accurate.

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[22] Some left to go into private practice, some left to go to other law schools, and two were fired because of their participation with the North Mississippi Rural Legal Services Program.

A CONVERSATIONAL APPROACH TO STATUTORY ANALYSIS: SAY WHAT YOU MEAN & MEAN WHAT YOU SAY

Donna D. Adler[*]

I. INTRODUCTION

If a statute is ambiguous, there is no single, absolutely correct and determinable interpretation. Rather, there is a range of possible meanings that the words of the statute will bear. The problems created by ambiguous statutes are felt most strongly by the consumers of those statutes. These entities or individuals must comply with the obligations imposed by the statutes, and they bear the burden of the inefficiencies created by ambiguity. While these inefficiencies cannot be completely eliminated, a method of statutory interpretation that increases the predictability of outcomes within the range of possible correct interpretations would reduce the costs associated with statutory ambiguity. Building on the work of others,[1] I suggest a new approach that views statutory interpre-

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[1] The method of interpretation that I suggest draws heavily on the foundational works of Professors William Eskridge, Philip Frickey, Jonathan Macey, Gregory Maggs, and William Popkin. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretations*, 135 U. PA. L. REV. 1479 (1987) [hereinafter *Dynamic Interpretations*]; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibri-*

tation as a conversation among governing bodies, the legislature, the judiciary, and the executive branch, about appropriate norms and rules.

This conversation, however, is not limited to those governing bodies. Rather, it is also a very public conversation directed toward those who must follow the established rules. It is a conversation that is both interactive and didactic. The first step in this conversation is a congressional statement in the form of an enacted statute. Users of that statute or rule then approach executive regulatory agencies and the courts with questions. "What does this statute mean in this particular circumstance?" Executive agencies, through rulings and regulations, and courts, through decisions, attempt to answer this question. The courts' response to this question has a large impact on the predictability of future outcomes and, therefore, on the continuing burdens of inefficiency caused by ambiguous statutes. The core of this approach is based on adopting background assumptions that assist rule users in finding answers to their questions. I am interested in finding a model that allows rule users to answer this question without having to resort to repeated litigation. Maximizing rule users' abilities to answer their own questions about ambiguous statutes will provide the largest reduction in costs associated with ambiguous statutes.[2]

At its most basic, a conversational model posits that rule users have a legitimate expectation that rule makers, Congress, the courts, and regulatory agencies will say what they

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um, 108 HARV. L. REV. 26 (1994) [hereinafter Eskridge & Frickey, *Equilibrium*]; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*]; Johnathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865 (1993).

[2] This would decrease direct research, litigation costs, and uncertainty costs (avoiding an activity for fear it is illegal or unknowingly engaging in illegal activity).

mean and mean what they say. Therefore, rule makers may demand that their words be respected, and rule users can hold the rule makers to their words. Because they must struggle with the application of statutory language even before judges, the concerns of rule users should play an important role in statutory interpretation.[3] If the rule makers do not say what they mean, intentionally or otherwise, the burden of those misstatements or unclear statements should, to the extent possible, come to rest on the shoulders of the rule makers and not the rule users. The method adopted, therefore, should be user directed and user concerned.

My "conversational" model of statutory interpretation attempts to structure a method of understanding statutes that is characteristic of how language is ordinarily used and understood. Various scholars have convincingly argued that applying a linguistic analysis to the interpretation of ambiguous statutes will "narrow the field of possible interpretations in ways that are both linguistically and intuitively sensible, making the court's decision more coherent and understandable to the various audiences that the court must address."[4] Although I do not adopt a linguistic analysis in my model, it is based on the assumption that there are methods of understanding language that the relevant speech community share,[5] and that incorporating those methods of assigning

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[3] This focus on rule users grows out of my exposure to the Internal Revenue Code (I.R.C.). The I.R.C. is saturated with statutory ambiguity, conflict, and uncertainty. It also carries with it an affirmative obligation on the part of taxpayers to comply with its strictures and to report that compliance on an ongoing basis. The tax code, therefore, provides a wonderful laboratory for considering how to impart meaning to ambiguous statutes. The utility of lessons that can be drawn from statutory interpretation in the tax area, however, is not limited to the tax realm. Professor Paul Caron has argued that treating tax law as "a self-contained body of law" has "impaired the development of tax law by shielding it from other areas of law" and that "other areas of law have been impoverished by the failure to consider how tax law can enrich their development." Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 517 (1994).

[4] Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1563 (1994).

[5] I adopt the same "relevant speech community" as Cunningham et al. which

"meaning" to statutory language will be more convincing and efficient than creating a separate and artificial method of understanding statutory language. Therefore, this model adopts only those formalisms that are necessary to define the authoritative "voices" of the institutional actors in the conversation. By modeling statutory interpretation on how participants in a conversation assign meaning to the statements made by others in the discussion, my approach attempts to provide more determinate results for rule users while respecting the appropriate balance between Congress and the courts.

This method of analysis fits within the model of "practical reasoning" that Professors Eskridge and Frickey have described. Building on a background of hermeneutical and pragmatic philosophical traditions, they have described an approach to interpretation that "militates against overreaching theories, [acknowledges] the complexity of interpretation and argument, [and] recognizes that different values will pull the interpreter in different directions."[6] In addition, they argue that considering a wide range of factors from the point of view of both the author and the interpreter of the text is normatively more appealing because it produces better decisions.[7]

A choice of a particular statutory interpretative methodology is unavoidably rooted in conceptions of the appropriate role of the courts in our constitutional system. Various models that commentators have constructed cast courts in the role of

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is "the contemporaneous set of literate and well-educated native speakers of English in the United States, except where technical legal meaning is involved, in which case the community is the smaller professional subset of lawyers and judges." *Id.* at 1563 n.8. These are the people who are engaged in the debate about statutory interpretation, either directly or through legal representation. In their work with ambiguous statutes Cunningham et al. stated "[a]lthough the discussion draws upon theoretical concepts that may be unfamiliar to lawyers and judges . . . we believe that our conclusions would make sense to judges because the analysis articulates linguistic distinctions that all members of the relevant speech community can recognize once they are brought to conscious attention." *Id.* at 1563.

[6] Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 323-24. They found that such an approach more accurately describes the analysis that judges undertake. *Id.* at 321-22.

[7] *Id.* at 364.

mere agents to enforce the "deals" that have been struck in the form of statutes.[8] Other commentators suggest that courts should take the opposite approach. These scholars posit that flaws in the legislative process should cause courts to apply interpretive methodologies that counteract the weaknesses of representative democracy.[9] Still others self-consciously define a partnership between Congress and the courts that frees courts to interpret statutory language in a manner that makes them "the best that they can be"[10] or updates statutes by a "process of interpretation [that is] carried out in a present-minded fashion, as if the statute had been recently enacted."[11]

Although each of these models provides valuable insights into legislative and judicial processes, they are often difficult to translate into an interpretive methodology that provides reasonably determinate directions to judges. Each is focused on defining the institutional relationship between the courts and Congress. Rule users, to the extent that they are considered at all, are viewed as either narrowly interested winners of deals or as passive beneficiaries of better legal rules. There is very little sense of rule users who have an active and involved interest in the system of assigning "meaning" to statutory language. My conversational approach attempts to make the concerns of rule users a central focus of statutory interpretation and to use that focus as an organizing principle that gives judges guidance in applying ambiguous statutes.

Professor Macey has convincingly described a role for the courts that accommodates not only the important interests of

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[8] Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 44 (1984).

[9] Eskridge, *Dynamic Interpretations*, *supra* note 1, at 1479; William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[10] RONALD DWORKIN, LAW'S EMPIRE 337-38 (1986).

[11] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 59 (1988). This approach, however, "does not ask an interpreter to keep a statute 'up to date' in the sense of predicting how a current legislature would answer the statutory question." *Id.*

Congress (to have its legislative authority respected) but also responds to the public need for a method of law formation that is coherent and rational.[12] Professor Macey describes a complex role for the courts that balances two primary concerns. "[T]he interpretive act must (1) result in making legislation more public-regarding by serving as a check on legislative excess, and it must (2) not intrude on the constitutional authority of the legislature to make law."[13] This balance both protects Congress's constitutional primacy in the legislative arena and "reflects the constitutional premise that federal courts improve the operation of the democratic process by serving as a structural check on the tendency of Congress to engage in factionalism."[14] Such a model also provides a constitutional foundation for an interpretation method that acknowledges the legitimate demands of rule users. The requirement that the courts respect Congress's voice in legislation increases predictability and protects reliance interests in circumstances where Congress has spoken clearly. Where Congress has not spoken clearly, the courts' role in curbing legislative excess by interpreting statutes in a public-regarding manner will bring greater rationality and coherence to a body of law.

This division between the rule makers and the rule users does not ignore the work that suggests statutes are compromises between various competing interest groups. While viewing statutes as compromises or contracts between groups vying for legislative advantage helps describe a portion of the legislative process, it is not an accurate description of the final

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[12] Macey, *supra* note 1, at 267.

[13] *Id.* at 225.

[14] *Id.* Professor Macey argues for a traditional or "soft" plain meaning approach. This would force special interest groups to get their position codified in explicit statutory language to be enforceable. This would increase the "cost" of private deals by making them more obvious and, therefore, harder to pass. If special interests do not get their wishes expressed in the plain language of the statutes, then courts are free to interpret the statute in a way that serves the public interest. *Id.* The constitutional balance he articulates, of courts playing an active and important role in law formation, can also accommodate a more dynamic form of interpretation.

product. Unlike contracts, statutes are open ended both in time and application.[15] This model, therefore, rejects the school of thought that advocates treating statutes like contracts and views judges as simply enforcers of those contracts.[16] Instead, judges are mediating a dispute between rule users who are now subject to the rule regardless of whether they had any involvement in the original compromise and who are contesting the meaning of the statute.

The conversational model assumes that any legislative process will generate ambiguity when the rules created are applied to concrete factual circumstances and asks how to minimize the problems caused by that ambiguity. This method of statutory interpretation fits within and owes a great intellectual debt to the Hart and Sacks tradition of courts as important and active contributors in the process that defines the law and attempts to make it more reasoned and fair.[17] It posits that judges should consider both the context and all that has been "said" about the statute by the participants in the discussion not as guardians of the rule makers but to protect the rule users from arbitrary and incoherent decision making.

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[15] For a fuller discussion of how statutes differ from contracts, see Eskridge, *Dynamic Interpretations*, *supra* note 1, at 1520-23.

[16] Given the bias against enforcing private deals in the guise of statutes that scholars have found, judges should not approach statutory interpretation as if they were enforcing a contract. Professor Popkin has persuasively argued that the vision of judges enforcing statutes as private deals or compromises between special interests is an inadequate description of both the legislative and the judicial process. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988) [hereinafter *Collaborative Interpretation*]. He contends that this approach to statutory interpretation is both descriptively and normatively flawed. *Id.* at 565-68; *see also* Eskridge, *Dynamic Interpretations*, *supra* note 1, at 1513-16 (discussing how constitutional structure supports deliberative government, not private deal enforcement); Macey, *supra* note 1, at 233-40; *cf.* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975) (discussing how judges should act as enforcers of legislative deals between interest groups).

[17] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

II. A Conversational Approach

When attempting to discern what a statute means, how do rule users begin? The reader of the statute will look at the language of the statute with a particular set of facts or circumstances in mind. If the language is indeterminate, or if there is something jarring about how that language applies to the particular set of facts, the reader searches for other clues as to the most probable of the possible meanings that the statutory language will bear. The important issue is identifying the best clues. Those are the ones that, if consistently used, will bring the largest number of participants in the conversation to the same answer. A conversational model posits that the best method of interpretation is one that maximizes the information that can be used to determine meaning.

This model would take into account all parts of the conversation and attempts to place that "discussion" in the relevant context. Statutes, judicial precedent, legislative history, and agency regulations are all a part of this conversation. Some of these "statements" are more formal and binding and, therefore, more deserving of deference. Some merely provide background understanding. They are all, however, part of the conversation that determines the formation of a body of law and defines the rules and standards by which the rule makers and the rule users will be bound. I would argue that models that exclude any part of this conversation, or sever the conversation from its context, exacerbate inefficiencies and are destructive to the formation and administration of a coherent body of law.

Participants in a conversation take into account the formality of statements made by a speaker, as well as the timing, the relationship to other statements, the context in which the statements are made, and any other intervening circumstances. Consideration of these factors, like timing, context, and changed circumstances, makes this model inherently dynamic in that the process of assigning meaning to the words of the statute is not limited to text and historical context. It is built on the foundation laid by Professor Eskridge's work on statutory interpretation. He persuasively argues that courts consis-

tently are influenced by "evolutive" considerations, and he concludes that the public interest is served best by interpreting statutes "in light of their current as well as historical context."[18] Critics of dynamic interpretation argue that this method is not sufficiently respectful of Congress's primacy in the legislative arena and that allowing judges to consider additional factors will give them too much discretion to impose their own policy preferences.[19] A statutory interpretation method that encompasses dynamic concerns is not necessarily less free of constraints. A dynamic method that describes a more structured use of historical and evolutive information can be respectful of congressional legislative primacy and give additional guidance to rule users without ignoring other important values.

My goal is to build a model for analyzing statutes that is not viewed as a turf war between Congress and the courts, but, rather, as a joint enterprise of governing. Respect for the appropriate roles of the various branches of government should be a prerequisite for a method of statutory interpretation. Congress has constitutional authority to legislate.[20] Courts have constitutional authority to decide the cases that come before them in a way that respects Congressional primacy in this realm. A variety of models and approaches, however, can satisfy these concerns, and deference to Congress does not mean that courts must forego their legitimate and unavoidable role in law making.[21]

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[18] Eskridge, *Dynamic Interpretations*, *supra* note 1, at 1554. Professor Eskridge effectively defends his model against charges that this method of interpretation shifts too much law-making authority to the judiciary at the expense of Congress. *Id.* at 1497-1538.

[19] For example, Professor Redish and Theodore Chung argue that "dynamic statutory interpretation presents serious problems from the standpoint of both practicality and democratic theory. . . . Unless we are prepared to abandon or, at a minimum, seriously compromise our commitment to self-determination and notions of popular sovereignty, dynamic statutory interpretation . . . must be rejected." Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 879-80 (1994).

[20] U.S. CONST. art. I.

[21] Professor Popkin points out that regardless of the approach judges take, a

Statutory interpretation based on a conversational model attempts to elucidate where the courts' legitimate voices should be heard in the ongoing discussion of the meaning of the law. It contains a straight-forward acknowledgement of the complexity of a judge's task. This method requires judges to be sensitive to nuances in different areas of law, to be knowledgeable about the structure and underpinnings of various statutory schemes, and to be willing to inquire about the ramifications of their decisions beyond the current case. By explicitly acknowledging statutory ambiguity and the wide variety of sources of meaning that are available, this approach encourages judges to shoulder responsibility for their part in law formation.

A. Is the Statute Clear?

In my conversational model, the first question a court would ask is "Has Congress, by its statements in this conversation, made its wishes clear?" This inquiry begins the court's task of determining if the statute has only one, or more than one, possible meaning. The judge should consider a wide range of "statements" and should not force a "plain meaning" on the statute with artificial formal rules.[22] In effect, the judge is looking at the language of the statute and trying to place it in its relevant context. Piecing together that context includes trying to discover what problems sparked Congress to "speak," what solutions were considered, and how this statement fits with other related statements that Congress has made. Statutory interpretation is essentially the courts attempting to apply Congress's directions to a specific set of facts and asking "Is this what you meant to say?"

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selection of any statutory method is a judicial decision about what the law is because it determines where law-making responsibility lies. Popkin, *supra* note 1, at 880.

[22] Even Justice Scalia, a leading proponent of "plain meaning" interpretation, will vary from the plain language of the statute in what he views as appropriate circumstances. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (noting literal interpretation of statute creates "bizarre" result).

Because Congress has the authority to have the first word in this conversation, the obligation rests with it to speak clearly. If Congress does a good job in selecting its words, the statutory language will be clearly and competently drafted, will identify the problem Congress was attempting to address, will present a solution that responds to the problem, and will fit with the structure of the remainder of the statute. In that case, all the relevant indicators of meaning will point in the same direction, the language of the statute will have only one possible meaning, and rule users can, without the assistance of judicial interpretation, determine what the statute means and what impact that rule has on their behavior. In the face of that level of statutory clarity, courts should follow that "plain" meaning both because of congressional primacy in this area and because this will maximize predictability.[23]

The more difficult case arises when the language used in the statute is indeterminate, when the background problem presented does not coincide with the language enacted, when new circumstances have arisen, or when Congress has made other statutory "statements" that conflict with the statute being considered. All of these situations suggest to the rule user that the words of the statute may have more than one possible meaning. If the language of a statute is indistinct or appears to clash with another statutory provision, the statute will seem unclear to the rule user.

As rule users attempt to apply the text of a statute to their factual situations, a variety of difficulties may arise in attempting to determine what that text means. The language of the statute could simply be insufficiently specific to answer the question posed. The language of the applicable statute may clash with its purpose or with the language or purpose of another statute. The circumstances that existed at the time

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[23] Congressional statements are often not this clear. Language is not always a perfectly accurate tool, and statutes are sometimes poorly articulated compromises. The question posed, however, is if congressional statements are not clear, who should bear the burden of that ambiguity and how can the costs associated with ambiguity be minimized.

the statute was enacted may have changed such that either new situations that Congress did not consider have arisen or the assumptions that formed the foundation of the statute are no longer accepted. A statute that seems reasonably clear and determinate on its face can reach an absurd result when applied to particular facts.[24] When one of these five situations arises, a judge is called upon to decide what results will be reached when the statute is applied to the rule users particular facts.

If Congress has not made itself clear, courts should openly acknowledge that the language has more than one possible meaning. Ignoring or denying statutory ambiguity does not solve the problems associated with unclear statutes.[25] Instead, doing so can be destructive. "When a court lacks candor, and the readers know it, the result can only be that the readers have less reason to trust that what the court says corresponds to what it means, and this results in a decrease in the legitimacy of the decision-making process."[26] If the circumstances surrounding the application of a statute suggest to rule users that it may have more than one meaning but the courts issue opinions that the statutes are clear and unambiguous, the rule users' confidence in the courts' reasoning will be undercut.[27] Lower courts that are looking for guidance will also be frustrated if the ambiguity is ignored, since the opinion that is drafted will not be helpful in explaining why one possible meaning was chosen over another.

The definition of ambiguity should include all situations where rule users have reasonable questions about a statute's

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[24] For a discussion of the application of statutes that reach absurd results see Veronica Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

[25] Professors Eskridge and Frickey found that judges overstate their cases and ignore countervailing arguments. Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 363-64. This attempt to establish reliance on objective factors, hampers a court's ability to fully explore all the relevant issues. *Id.*

[26] LAWRENCE SOLAN, THE LANGUAGE OF JUDGES 7 (1993).

[27] William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1187 (1992) [hereinafter *Internal Critique*].

meaning in a given context. Those questions can be sparked by the statutory language, by its application to specific facts, or by relevant external sources that suggest the language has more than one meaning. Listening to all parts of the conversation acknowledges that more than one possible meaning exists. Rule users will have already ferreted this out—why should courts ignore it?

B. What if the Statutory Language is not Clear?

At this juncture the court is faced with the difficult task of deciding how to determine what the statute "means." A conversational approach shifts the focus from the rule makers to the rule users. Instead of asking "What did Congress mean?" a judge should ask "What would a reasonable reader of this statute, who has 'heard' all the statements made by Congress, by regulatory agencies, and by the courts in prior decisions believe the statute means?"[28] A "reasonable reader" is one who is knowledgeable about the various sources of meaning but has no vested interest in a particular outcome.[29] This method of assigning meaning to the statute avoids presenting the courts with an impossible task—discerning an answer provided by Congress where Congress has not expressed one.[30]

The reasonable reader standard, instead, allows judges to act within a conventional framework. Rather than speculating on the unknowable, the conversational model instructs judges

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[28] The relevant sources of meaning are those "statements" from speakers who play a legitimate institutional role in the formation of law—legislatures, executive agencies, and courts. In addition, a reasonable reader would also engage in fact development and would attempt to place the statute in its relevant context. Scholarly commentary and other sources would be useful to the extent that they made convincing arguments about the positions of the institutional speakers or the context in which that discussion takes place.

[29] The reasonable reader, therefore, is differentiated from the rule users who are advocating for particular meanings for the statute based on their interest in the outcome.

[30] It is similarly unreasonable to ask a court to determine what Congress's answer to a particular question is when Congress has provided conflicting answers.

to apply an articulated standard to the relevant evidence.[31] Decision makers will weigh the evidence given by various sources of meaning and determine, as best they can, what a reasonable reader would believe the statute directs based on that evidence. In cases of first impression, application of a "reasonable reader" standard will improve predictability (first-tier predictability) for rule users. Rather than guessing what Congress would have done in this case if Congress had considered the issue, rule users instead are faced with a more limited prediction. Courts and rule users evaluate the various statements about statutory meaning and decide the most likely meaning based on those statements.

Even in cases where the sources of meaning are in conflict, the conversational approach provides significant benefits. Rule users could not consistently predict the outcome of these cases using a conversational, or any other, method of interpretation. A conversational approach, however, by consciously weighing and evaluating the sources of meaning will improve guidance for later cases (second-tier predictability). Decisions reached under this method will provide rule users and lower courts with a more balanced and useful assessment of the rationale that was important to the outcome.

Although a reasonable reader would take into account what Congress, courts, and regulatory agencies have said and whether circumstances have changed since any of those statements were made, this inquiry is not as wide open as it might first appear. A reasonable reader would be aware of the relative authority and formality of various parts of the discussion. This will protect Congress's primary role in legislation. The language of the statute, the structure of the statutory scheme, and the congressional purpose (to the extent its purpose is clearly articulated) are the most important sources of meaning. Therefore, a conversational method does not undercut congressional legislative preeminence. Rather, it merely acknowledges more directly that congressional instructions are

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[31] By explicitly considering the viewpoint of reasonable rule users, this approach also responds to Justice Scalia's rule of law and justice concerns.

not always clear. In those spaces, where statutes are ambiguous, courts legitimately exercise their authority to determine meaning.

Different areas of law, different types of statutes, and different types of ambiguities call for different approaches. Some areas of law and statutes, such as tax, use a different and very arcane "language." Some statutory schemes, like bank regulations, are directed at very specialized audiences. Some areas of law regularly address broader and more controversial issues, including issues of constitutional concern. Issues of race and sex discrimination or of abortion funding present these fundamentally important issues. Others grapple with more technical and prosaic problems. Although the basic framework of the conversational model is applicable to all types of statutes, the importance of sources will vary depending on the utility of that source in a particular area of law. For example, structure should play an important role in the interpretation of tax statutes because it provides reliable clues in a statutory scheme that is designed to be internally coherent.[32] The interpretive guidelines suggested by this conversational approach are merely tools to be used in arriving at statutory meaning. They are not hard and fast "rules" that can be mechanically applied. For instance, the legislative history of a statute describing an indistinct category will not always provide clear parameters for that statutory language. Statutory interpretation needs to be approached with an appreciation of the context in which the question arises and with an eye to what is available to rule users.

This approach to interpreting statutes rejects traditional methods that have tried to limit the judiciary's role to that of an agent carrying out Congress's will.[33] Viewing the court as merely a congressional agent, even a creative agent,[34] is

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[32] Extensive cross referencing of sections that explicitly establish the priority of one provision over another, sections that depend on other sections for operative rules, and consistent definitional schemes are all evidence of this structural design.

[33] *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 325-45 (discussing methods that stress courts' role as congressional agent).

[34] *See id.* at 328-31 (discussing various ways of posing question of congres-

based on the incorrect assumption that Congress engages in a monologue. Professors Eskridge and Frickey have found that the relationships among Congress and the other branches of government are not so limited.[35] Instead, they describe a system where institutions interact with one another.[36] Congress, regulatory agencies, and courts communicate with each other not only overrides but also through "signals." These signaling devices, including dictum in Supreme Court opinions and congressional committee reports, are "expressions of preference that have no traditionally understood legal 'authority.'"[37] They "contribute to the efficient operation of an institutional system. Like bids in a game of bridge, signals are a relatively cheap way for cooperating institutions to exchange preferences in the process of reaching the best contract or deal."[38]

Rather than a one-way edict from Congress that is frozen in time, a conversational model acknowledges that there is a continuing dialogue among the branches of government and between the government and rule users. A method of statutory interpretation that candidly recognizes the judiciary's role in law creation would encourage the drafting of opinions that

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sional intent). Professors Eskridge and Frickey critically note how judges may "imaginatively reconstruct" the statute or play "amateur historian" when ascertaining the meaning and purpose of a statute. *Id.* Judge Posner has suggested that courts approach unclear statutes as if they were garbled military orders. The task of the interpreter is to figure out what outcome would best advance the enterprise that Congress began with the enactment of the statute. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1987) [hereinafter *Legal Formalism*].

[35] Eskridge & Frickey, *Equilibrium*, *supra* note 1, at 28-33.

[36] *Id.*

> The interaction is typically sequential. Congress enacts statutes acceptable to the President, agencies implement them through regulations and enforcement proceedings, the judiciary interprets the statutes and agency actions, and Congress considers amending the statute to update it or to override errant interpretations. A consequence of sequence is that each institution has trumping power. The rule adopted by each institution can be undone by the next institution to act.

Id. at 30.

[37] *Id.* at 39.

[38] *Id.* at 40.

give more direction to lower courts and to those governed by the statute. If courts acknowledge that they are creating "meaning" by their interpretation of statutes and do not hide behind the mask of acting as mere agents of Congress, then they could openly discuss the factors that truly determine their opinions.

Allowing courts to consider more wide-ranging factors leads to countermajoritarian anxiety. The countermajoritarian argument against dynamic interpretation, however, has been overstated.[39] Acknowledging that a statute is not clear on its face or in its relevant context is not to say that the courts are free to fashion answers based merely on their own preferences. There are limitations on the courts' ability to substitute their policy judgments for those of Congress. First, the language of a statute significantly limits the range of possible answers. Even if the court adopts a "nonliteral" interpretation of a statute, the statutory language and structure will only have a limited number of interpretations that the words will bear. Second, if the courts stray too far from what Congress and regulatory agencies find to be an acceptable interpretation of a statute, the decision will be overridden.[40] Third, except for the Supreme Court, courts risk having their statutory interpretations overturned by higher courts if their decisions are too idiosyncratic. Having their decisions subjected to this type of oversight discourages judges from exercising unbounded decisional discretion. Last, the drafting and publishing of

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[39] Often ignored in the discussion of the countermajoritarian influences is that while federal judges and Supreme Court justices are not elected, their selection is an intensely political process. Members of the federal bench cannot be removed by the voters, but they are selected by the President and supported or opposed by the Senate for the political viewpoint that they represent.

[40] As Professors Eskridge and Frickey point out, courts are reluctant to try Congress's patience too far since being overridden by a statutory change undercuts the courts' authority and stature. Eskridge & Frickey, *Equilibrium*, *supra* note 1, at 36-39. Although congressional amendment of an existing statute is difficult, Congress does appear to respond if the courts go too far. *See generally id.* at 30-33 (discussing Civil Rights Act of 1991); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 11-20 (1994) (discussing changes in Age Discrimination in Employment Act).

judicial opinions require that judges articulate a rationale for their decisions. The need for justification of their decisions acts as a brake on judicial latitude. Opinions are drafted not only to display the courts' logic but also to set out the evidence of legal authority that led to the decision.

This last limit on judicial discretion, needing to provide justification for the courts' opinions, is a double-edged sword. Lawrence Solan, in his linguistic analysis of judicial opinions, notes that "the requirement that judges rely upon a received corpus of law and neutral principles to decide cases" and the "pressure on them to speak with a definitive voice" often acts "as a wedge, driving apart decision making on the one hand and presentation on the other."[41] He finds that judges' opinions, therefore, rarely reflect the difficult analytical process that actually led them to their decisions. Instead, judges prefer to justify their opinions by a reference to controlling "law" that predetermined the outcomes that were reached.[42] Because the analysis that leads to a particular outcome is rarely that simple, the opinion that states the outcome was reached by a mechanical application of neutral, well-ordered law is at best unconvincing.[43]

A court's strength and its appropriate role is the application of general rules to specific facts. If the court is not candid about its opinions, statutory ambiguity continues and is per-

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[41] SOLAN, *supra* note 26, at 2.

[42] *Id.*; *see also* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993). Martineau argues that theories and canons do not play decisive role in decision making. Rather, they are merely used as justification for a decision that was reached on other grounds. He also argues that there is little if any connection between decision making and justification. Martineau, *supra*, at 34-40. His point is perhaps overstated but provides valuable insight. If his description of the decision-making process is even partially accurate, then the system of judges deciding opinions and clerks drafting opinions to justify those decisions leads to an interesting situation where judicial clerks are assigned the task of defining precedent for future cases.

[43] Often the dissent is more than willing to highlight the weaknesses in the majority opinion, further undercutting the persuasiveness of the majority's analysis. For example, see the dissent in Commissioner v. Schleier, ____ U.S. ____, 115 S. Ct. 2159 (1995).

haps made worse. Even if the correct result is reached, disingenuous opinions or overstated rationales fail to give rule users guidance for future questions involving the same statute. Drafting more candid opinions will also lead to more modest opinions.[44] A reduction of hyperbole and overstatement of grand theories of law would result in increased guidance to lower courts and rule users. Judicial opinions could focus on describing what factors were truly important to the court's decision rather than constructing rules that putatively compelled the outcome that was reached.[45]

Adopting a conversational method of analysis would act as a counterweight to the courts' inclination to hide behind their role of congressional agent and to bolster their decisions with unpersuasive and makeweight arguments. Even in cases where the conversational method would not change the outcome, this approach has advantages. Courts that consider all the relevant sources of meaning and that weigh the relative importance and clarity of those sources will produce better opinions. The discussion in decisions that follow this method of analysis will focus on evaluating what the participants in the conversation have said about the statute rather than unconvincing formalisms.[46]

C. Sources of Meaning

Statutory language and executive agency regulations[47]

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[44] *See generally* Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 371 (discussing benefits of more candid opinions).

[45] If Judge Posner is correct about how some decisions are drafted, then the procedure of writing opinions may need to be changed to accomplish this end. He has suggested that law clerks drafting Supreme Court opinions are "unsure what [they] can leave out. Not being the judge, [they are] unsure what facts and reasons are essential and [they] naturally tend to err on the side of inclusion." RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 108 (1985).

[46] *See generally* Eskridge & Frickey, *Practical Reasoning*, *supra* note 1 (discussing value of an approach that considers a wide range of factors).

[47] Currently a lively debate is taking place about the relative weight of agency regulations. *See* Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); Thomas W.

are universally accepted sources of statutory meaning. The more difficult question is what other sources are valid indicators of statutory meaning. Although courts have traditionally used many sources other than the statutory text and formal rules of construction in reaching their decisions about the application of a statute,[48] scholars and jurists are debating the issue of whether use of these external sources is appropriate.[49] A conversational approach would consider other sources, both to determine if an ambiguity exists and to decide how the statutory language will be interpreted. Its focus on rule users provides a new justification for judicial reliance on legislative statements other than the statutory language and on judicial precedent.

1. Legislative Purpose

The search for legislative purpose has been criticized because even if a statutory purpose is identified, it often does not provide determinate results and because the assumptions

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Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). However, no one questions that regulations are a legitimate part of the conversation on statutory meaning. Rather, the argument focuses on how loud executive agencies' voices are. That discussion is beyond the scope of this article.

[48] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626-27 (1990) [hereinafter *New Textualism*] (describing a traditional approach to statutory interpretation that considers a broad range of legislative history).

[49] For an overview of past and current approaches to statutory interpretation, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983); Frank H. Easterbrook, *The Role of Original Intent In Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); Eskridge, *New Textualism*, *supra* note 48, at 640-54; Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989) [hereinafter *Interpretation Primer*]; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 76 N.Y.U. L. REV. 907 (1992); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

underlying finding a statutory purpose are unrealistic.[50] The "purpose" of a statute, however, can provide important background and context for answering interpretive questions. For example, the background and context supplied by statutory purpose could suggest that the terms of the statute are terms of art or could suggest that while certain meanings of the words used are possible they are not probable because that would make the statute unresponsive to the problem the statute was designed to address.

The first criticism—that statutory purpose is indeterminate—is caused not by reliance on statutory purpose but by over-reliance.[51] Professors Eskridge and Frickey demonstrate, in their discussion of *United Steelworkers v. Weber*,[52] that purposivism cannot consistently provide determinate results.[53] A conversational model recognizes that the "purpose" of a statute does not provide the only, or even the most important, interpretive statement and uses statutory purpose in a much more limited way. Rather than expecting a consistently definitive answer to the ultimate interpretive question from statutory purpose, this model uses the statute's purpose simply for the clues that it can provide.

The very concept of a statutory purpose has been questioned as well. "[P]urposivism's apparent majoritarian justifications rest upon questionable assumptions about the legislative process."[54] Professors Hart and Sacks assumed that the

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[50] Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 333-37 (discussing challenges to traditional notions of legislative purpose posed by modern public choice theory, economic analysis of public decision making, and interest group theory).

[51] A "purposivist" approach similar to that advocated by Professors Henry Hart and Albert Sacks asserts that "In interpreting a statute a court should: 1) Decide what purpose ought to be attributed to the statute . . . and 2) Interpret the words of the statute . . . so as to carry out the purpose as best it can." HART & SACKS, *supra* note 17, at 1169; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation, Scholarship & Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693-700 (1987) (describing Hart and Sacks approach and exploring its limitations).

[52] 443 U.S. 193 (1979).

[53] Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 332-37.

[54] *Id.* at 333-34.

"legislature is filled with reasonable people who will reach reasonable, purposive results by following established procedures."[55] Once again the use of "statutory purpose" in a conversational model is more modest. In this context "purpose" does not mean what any particular legislator, or even the majority of legislators who voted for the bill, had in mind. A grand, over-arching purpose (ultimate purpose) may not exist. Rather, the inquiry is focused on what the statute was designed to accomplish (implementive purpose).[56] It is inconceivable that a statute is proposed, drafted, debated, and enacted in order to have absolutely no effect. It is that limited "purpose" that a conversational model uses as an interpretive clue.

Applying the sources that provide hints about purpose with a little common sense and an honest acknowledgement of their limitations will allow statutory purpose to be a useful tool that provides clues to statutory meaning without engaging in flights of fancy about how a statutory purpose can always be found to answer difficult questions of statutory ambiguity. If a rule user can determine from the legislative history of a statute, or from the structure of the area of law, what problem Congress had set out to solve, then the rule user can begin to limit the possible meanings to assign to indistinct language. Sometimes the purpose of a statute can even provide a sufficiently certain answer to the ambiguity posed such that rule users can determine the correct answer without the need for judicial interpretation. Thus, a purposive approach that uses legislative history and structure is more determinate than an interpretation method that divorces the statutory language from its context.

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[55] *Id.* at 334 (citing HART & SACKS, *supra* note 17, at 1378).

[56] Professors Summers and Marshall make this useful distinction between ultimate and implementive purpose. Their definition of implementive purpose, however, is linked to an "ordinary meaning" analysis that is not particularly helpful when the words of the statute are indistinct. Robert S. Summers & Geoffrey Marshall, *The Argument from Ordinary Meaning in Statutory Interpretation*, 43 N. IR. LEGAL Q. 213, 221 (1992).

a. Legislative History

Some scholars and judges have criticized the use of legislative history in statutory analysis on both formalist and realist grounds. For example, Justice Scalia has articulated the formalist objections to the use of legislative histories. He asserts that reliance on legislative histories allows Congress to engage in unenacted law making. Because the various pieces of legislative history are not voted on by Congress and are not signed by the President, Justice Scalia rejects the consideration of committee reports in determining statutory meaning.[57]

The response to Justice Scalia's concern is that legislative histories are not being used as a rule of law. Obviously legislative histories are a less formal statement than statutory language and, therefore, are less deserving of deference. They do not determine what the law is, but they provide a useful piece of background and context to determine if statutory language

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[57] Justice Scalia has discussed his rejection of legislative history, particularly committee reports, as a source of statutory meaning in various decisions. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518-19 (1993) (Scalia, J., concurring) (stating reliance on legislative history is "waste of research time and ink" as well as "a false and disruptive lesson in the law"); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) (stating committee reports should not be considered at all in determining statutory meaning); Begier v. IRS, 496 U.S. 53, 69 (1990) (finding it "both demeaning and unproductive" for Court to consider committee reports as "controlling statutory text"); Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) (stating Court's "unrestrained use of legislative history" has reached level of "unreality"); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (finding "no justification for resort to the legislative history"); Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (stating that legislative history is a "frail substitute[] for bicameral vote upon the text of a law and its presentment to the President"); Immigration & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (stating that considering legislative history, when statutory language is clear, is "ill advised"); Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (stating legislative history was not proper consideration in deciding case). *See also* Eskridge, *New Textualism*, *supra* note 48, at 650-53 (discussing Justice Scalia's negative critique of legislative history as interpretive tool); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 165-68 (discussing Justice Scalia's rejection of legislative history).

has more than one possible meaning.[58]

Assuming for the moment that legislative histories are a good faith attempt by Congress to explain the statute that it enacted, courts should take that into consideration in determining the meaning of the statutory language. What benefit is reaped by the courts ignoring Congress's statements and knowingly making a decision that flies in the face of Congress's wishes? Such an approach produces greater inefficiency for rule users. Either Congress will disagree with the court's interpretation and correct the mistake by amending the statute, subjecting rule users to large pendulum swings and uncertainty in the law, or, more likely, Congress will, for institutional and procedural reasons, be unable to correct the court's mistake,[59] leaving rule users subject to a rule different from that which Congress intended. Congressional resources are also wasted in amending or attempting to amend the misinterpreted statute.[60] Judicial decision makers and rule users should be able to use Congress's formal statements for guidance on the meaning of statutes. In addition, Congress is entitled to have its description of its own work respected rather than ignored by a judiciary that disapproves of either Congress's procedures or its product.

Far from disapproving of the use of Congress's legislative history, many legislators have encouraged the use of legislative history in statutory interpretation.[61] Professor Brudney

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[58] "Legislative history contains the best available evidence of both the context and the circumstances of enactment." George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 65.

[59] Brudney, *supra* note 40, at 20-26 (discussing difficulty of amending statutes).

[60] *Id.* at 9-20 (describing Congress's amendment of the Age Discrimination in Employment Act after the Court rejected an interpretation of statute that was supported by legislative history).

[61] *Id.* at 56. "In recent years, the practice of relying on legislative history to discern the meaning of statutes has been endorsed by an array of current and former senators and representatives." *Id.* For example, Senator Hatch urges a reasoned and cautious use of legislative history. "[L]egislative history, properly applied, can have great value in the interpretive process. . . . In today's era of renewed substantive due process and free-wheeling statutory interpretation, reli-

highlights that "[t]his broad-based support for legislative history as reliable and valuable, at least in principle, is not surprising given that the alternative is far less workable. It is doubtful that Congress would be able to add to text the details and explanations now included in legislative history."[62] In addition, "[t]he fact that members of both parties have continued to participate in creating, negotiating, and relying on legislative history suggests that complaints are isolated voices of protest."[63]

Scholars who have investigated the formulation and use of legislative history consistently defend reliance on committee reports[64] and criticize the rejection of legislative history as countermajoritarian.[65] Congress has chosen to organize itself into specialized committees and to use staff personnel to carry

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able forms of legislative history can once again serve as additional strands to tie judges to the law itself." Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 43 (1988).

[62] Brudney, *supra* note 40, at 57. Textualism "raises the costs of drafting legislation by increasing the penalties for ambiguities. Thus, Congress will be required to invest additional resources in drafting. The resultant, less ambiguous statutes will also leave administrative agencies less leeway . . . ." Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 458 (1988).

[63] Brudney, *supra* note 40, at 57 n.224.

[64] *Id.* at 40-65; Costello, *supra* note 58, at 72-73. This article explores the weight that has traditionally been given to different forms of legislative history, with committee reports receiving most deference. Costello concluded that

> in the ordinary course of legislation, committee reports should be looked to for the most coherent, thorough, and authoritative explanation of a bill's purpose and intended meaning. To abandon altogether reliance on committee reports not only ignores the way Congress customarily operates, but also denies access to the best source of congressional explanation.

Costello, *supra* note 58, at 72-73; *see also* Muriel M. Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 599 (1994) (concluding committee reports are "the primary course of knowledge" regarding bill's provisions).

[65] *See* Brudney, *supra* note 40, at 40, 47; Spence, *supra* note 64, at 593-611. Professor Frickey argues that a textualist approach "make[s] it more difficult for Congress to have its way." Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 263 (1992).

out its legislative tasks.[66] "Many former and current members have confirmed the central importance of committee reports to their own understanding of statutory text."[67] For example, scholars have found that committee reports are read by legislators more often than the statutory language itself.[68] The courts, by questioning the procedures by which Congress produces legislative history, undercuts congressional authority and impinges on the legislative branch's autonomy.[69]

These same writers, all who have significant first-hand experience with the legislative process, discount the practical problems that have been raised about the authenticity and reliability of legislative history. They point out that staffs are not likely to act against the interest of their legislator or committee because "[l]oyalty and congruence of viewpoints are highly relevant hiring considerations if one is to promote the member's own legislative values and policies."[70] If a staff member did overstep his or her bounds "repeated actions taken to further independent agendas are likely to come to the member's attention and result in discipline or discharge."[71]

Legislators have a strong interest in maintaining staffs that act according to the member's viewpoint. Congressmen must cast votes based on the information and advice provided by their staffs. Ultimately the members will be held politically

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[66] Costello, *supra* note 58, at 66-67.

[67] Brudney, *supra* note 40, at 28.

[68] WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 74 (2d ed. 1984). In many cases, a report is the only document members read before deciding how they will cast their votes. *Id.*

[69] *See* Brudney, *supra* note 40, at 47; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385-86 (use of legislative history is more respectful of congressional primacy); Spence, *supra* note 64, at 588 (stating "textualism" enhances power of judiciary at expense of Congress); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306-07 (1990) [hereinafter *Sizzling Sleeper*]. If legislative history is disregarded, Congress's form of organization and authority will be "second-guessed." Wald, *Sizzling Sleeper*, *supra*, at 306-07.

[70] Brudney, *supra* note 40, at 50; Costello, *supra* note 58, at 67.

[71] Brudney, *supra* note 40, at 50. Congressional staff members are at-will employees. *Id.*

accountable for those votes. Thus, they have a strong practical interest in retaining staff members who support the legislator's political agenda. Committee members have other practical reasons for exercising control over committee staffs. Legislators on committees need to preserve a long-term relationship with other Congressmen.[72] Attempting to include material in the committee report that does not conform to the statutory language of the bill will create controversy. Minority or dissenting views of committee members will highlight potentially biased material in the committee report.[73] Attention from and competition between interest groups reduce the chance that such material will be inserted in the committee report unnoticed.[74]

Even if legislative history is not an accurate description of Congressional intent, a conversational method would still use these statements as a source of statutory meaning. This interpretation method not only posits that the various branches of government have a legitimate voice in the legal conversation, but also that those government actors assume responsibility for their statements. The terms of the debate about legislative history shifts when viewed from the perspective of the rule user. Rather than focus on whether Congress, or certain members of Congress, are reaping an unfair advantage in the drafting of legislative histories, the approach should be one of holding Congress to its word.

Constitutionally enacted statutes are recognized and respected even though a majority of members may not agree with the content of the statute or may not even know what is in the bill on which they voted. Even if senators and representatives who voted in the majority do not agree with the statute and only voted yes in return for a fellow congressman's support on another bill (logrolling), the legislation passes and becomes the official "voice" of Congress. In effect, the congress-

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[72] *Id.* at 54. Such relationships require honesty and fairness, even in the midst of partisan disputes. *Id.*

[73] *Id.* at 59-60; Costello, *supra* note 58, at 67.

[74] Spence, *supra* note 64, at 607.

men sign on to the end result, and it is irrelevant that they do or do not agree with every piece of the statute. The statute, in its entirety, becomes Congress's statement of the law.

Similarly, Congress should be held responsible for the less formal ways that it chooses to communicate. Just as it is irrelevant why a congressman supported a bill, we should not care why he or she did not object to what was in a committee report. Perhaps the congressman agreed with the bill and did not object to the committee report merely to avoid reading it, perhaps out of party loyalty or discipline, or for logrolling purposes. To determine what the statute means, the important question is what was the representative or senator willing to give up in return for whatever he or she received. In addition, because courts consistently use legislative histories in their interpretive considerations,[75] Congress is on notice that reports will be used in such a manner. Therefore, if legislators disagree with something in the committee report, they have every incentive to object to the report. Moreover, if sufficient numbers of congressmen disagree with the content of a committee report, they could demand the report be changed, or Congress could choose to change the method of producing legislative history. In sum, if this procedure is being abused by certain members, it is up to Congress to address this problem. It is not within the appropriate purview of the courts to tell Congress how to determine its internal rules.[76]

The realist criticism of the use of legislative history is tied to discussions of public choice theory which "suggests that congressional enactments are not motivated by conceptions of the public interest; rather, federal statutes might reflect pri-

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[75] *See* Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term: Scalia Rails But Legislative History Remains on Track*, 23 SW. U. L. REV. 47 (1993) [hereinafter *1992 Cases*]. Legislative sources have been cited by the Supreme Court consistently since the 1920's. *Id.* at 48.

[76] Indeed, various writers have suggested that the courts questioning Congress's choice of how to organize its work procedures and product raises constitutional questions. *See* Brudney, *supra* note 40, at 39-40; Spence, *supra* note 64, at 594; Wald, *Sizzling Sleeper*, *supra* note 69, at 307.

vate interest deals, re-election posturing, or arbitrary outcomes."[77] Relying on the "discoveries of public choice theory," Judge Frank Easterbrook has stated "[a]lthough legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice."[78] Rather, because of the flaws in legislative voting processes "[i]t is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support."[79] The lesson that Judge Easterbrook and textualists draw from public choice theory is that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' [that are] hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."[80] If Congress does not have an identifiable and articulable intent, as public choice theory suggests, then the legislative history produced cannot reflect anything about congressional intent or purpose.

Even assuming that legislative histories do not represent (or do not necessarily represent) the intent of a majority of Congress, a conversational approach to statutory interpretation would still use legislative history to determine a statute's meaning.[81] Holding Congress to its word is more efficient and more beneficial to rule users than ignoring what it has to say. If the language of a statute is ambiguous or seems to conflict with another statute, the legislative history might provide the

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[77] Farber & Frickey, *supra* note 62, at 424. For an overview of public choice theory and its implications, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

[78] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

[79] *Id.*

[80] *Id.*

[81] Even if public choice theory, and the research it has generated, offers valuable insights into the legislative process, there is widespread disagreement about which, if any, judicial statutory interpretation model the theory would support. Professor Eskridge has argued that public choice theory does not support any general theory of statutory interpretation. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

solution to the ambiguity. Looking to congressional purpose in the form of legislative history and structure can, in some situations, provide a determinate answer.[82] Even if this does not accurately reflect the "deal" that was struck by competing interest groups or the actual intent of the legislative body, when Congress does not or cannot make that deal sufficiently clear in the statutory language, courts and rule users should be free to take Congress at its word as expressed in its formally produced statements.[83]

In addition, the contribution that public choice theory makes to the undertaking of statutory interpretation is not as clear or as uncontroverted as some of its proponents would suggest.[84] Some scholars have questioned whether public choice theory accurately predicts or describes how legislatures

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[82] For example, in his article explaining and evaluating the Uniform Commercial Code, Professor Julian McDonnell advocates using legislative history in interpretation of the U.C.C. "Commercial lawyers believe that purposive interpretation reduces uncertainties created by linguistic features such as ambiguity and vagueness and also assists in deciding whether the literal message of the drafters should be applied to a given particular." Julian B. McDonnell, *Definition and Dialogue in Commercial Law*, 89 NW. U. L. REV. 623, 632 (1995).

[83] Professor Macey identifies two types of special-interest legislation and asserts that the cost of these special statutes to the legislators agreeing to them is "the loss of support from individuals and groups who are aware that they are harmed by the legislation." *Macey,* supra note 1, at 232. "Open-explicit" statutes are undisguised wealth transfers to a favored group. *Id.* at 233. These statutes tend to be "not ambiguous and therefore more likely to be enforced in precisely the way the relevant interest groups prefer." *Id.* The legislator's "cost" for these statutes is reflected more accurately because more individuals will be aware of the wealth transfer. *Id.* at 232. The other type of special-interest statutes are "hidden-implicit" statutes, which hide their special interest nature behind "a public interest facade." *Id.* These statutes tend to be more ambiguous in order to hide the wealth transfer to the favored group. Macey, *supra* note 1, at 233. "[I]nterest groups must make a trade-off between the higher political costs associated with open-explicit statutes and the greater uncertainty associated with hidden-implicit statutes." *Id.*

My conversational model is based on the assumption that if a special-interest group (or legislator) is not willing to pay the "cost" of special interest legislation through disclosure of that purpose, then they are not unfairly disadvantaged if their "deal" is not upheld. The public, however, is harmed by special-interest legislation, and that burden should not be imposed if the nature of the burden has been hidden behind public-regarding rhetoric.

[84] Farber & Frickey, *supra* note 62, at 429-35.

function. One scholar has found a "radical inconsistency between what the theory implies and what is in fact observed."[85] After reviewing the more recent public choice literature, Professors Farber and Frickey found that "we have very strong reasons, both empirical and theoretical, for believing that actual legislatures do not suffer from the instability and incoherence some public choice theories have predicted."[86] Other writers have questioned the theoretical underpinnings of public choice theory.[87] If public choice theory is not an accurate description of the legislative process, the case for the use of legislative histories is strengthened.

Judge Starr, however, has raised practical concerns about the potential abuse of legislative history. "These concerns fall into three groups: the potential for abuse, the cost of usage, and fictitious use."[88] The difficulties raised by the use of legislative history as an interpretive aid, however, can be minimized by careful application. The fictitious use of legislative

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[85] William H. Panning, *Formal Models of Legislative Processes*, *in* HANDBOOK OF LEGISLATIVE RESEARCH 669, 680, 689 (Gerhard Loewenberg et al. eds., 1985); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 3 (1991).

[86] Farber & Frickey, *supra* note 62, at 435. They also found that "the notion of a coherent legislative intent is consistent with current public choice theory" and that public choice theory supports a cautious use of committee reports. *Id.* at 425. Professor Mark Kelman has argued that the scholars who are

> ideologically committed to the proposition that the sole function of the democratic branches of government is the creation of rents through cartelization . . . support their preconception with empirical studies that are so off the point and unpersuasive that a reasonably skeptical outsider must ultimately feel that she is dealing with a cult, a group that reassures itself with ritual incantation of familiar homilies that appear to be utter mumbo jumbo to nonbelievers.

Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 204-05 (1988).

[87] Kelman, *supra* note 86, at 205-36; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2127 (1990).

[88] Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377. Judge Starr states that the most valid concern about the use of legislative history is the potential for it to be manipulated. *Id.*

history can be avoided by conceding that not all legislative history is equally dependable and rejecting those parts of legislative history that are questionable. If the courts do not ask legislative history to carry too heavy a burden, then its manipulative use can be minimized. The most disingenuous use of legislative history[89] occurs when courts are trying to hide behind their role as agent and assert that their holding was predetermined by congressional direction. Courts need to use legislative history for the clues that it can provide and admit when it is not useful.

While the most useful contribution from legislative histories provides background context and explanation of the purpose of enacting the statute,[90] specificity in legislative history should not be ignored. While detailed guidance included in committee reports but not in the statutory language is not binding on courts, it can be useful in several ways. Examples can be indicators of purpose. Giving a fact pattern and explaining the outcome that the committee anticipates under the statute is often an effective way of illustrating how the committee expects the statute to function.[91]

Some specifics included in the committee reports are part of the conversation between Congress and executive agencies.

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[89] The selective use of legislative history has been described as "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal).

[90] Even commentators who are generally hostile to the use of legislative history concede that it can provide useful background material on context. Dickerson, *supra* note 50, at 128. An extensive review of the tax legislation process by Professor Michael Livingston led to the same conclusion. Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 886-87 (1991).

[91] This is not to say that Congress should be able to control either the judicial or agency outcomes based on specific rules or examples placed in legislative histories. These types of examples and special rules deserve less deference than the general description of the statute's purpose or examples that are merely illustrative. Attempts to determine outcomes of specific controversies that are not reflected in the statute are the most likely area for abuse and, therefore, deserve less deference. Legislators should not be able to grant special treatment to certain rule users through the use of legislative history. Macey, *supra* note 1, at 233.

This is what Professor Eskridge calls "signalling."[92] Executive agencies that are dependent on Congress for funding seem unlikely to ignore these instructions. In the tax area, language from committee reports is often reproduced verbatim in Treasury regulations.[93] When faced with indistinct statutory language, and the legislative history provides an answer that is consistent with both a possible reading of the statute and the overall purpose of the statute, following the legislative history provides a more predictable and determinate result and decreases the costs of ambiguity for rule users.[94]

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[92] *See supra* notes 36-39 and accompanying text.

[93] For example, the legislative history of I.R.C. § 132 included in its discussion of the qualifications of a no-additional-cost fringe benefit the provision that

> [a]n employer does incur substantial additional cost (and hence the exclusion is not available) if a substantial amount of time is spent by employees in providing a service for other employees, even if that time may be viewed as 'idle' time, or even if the work is performed after normal business hours.

STAFF OF THE JOINT COMM. ON TAXATION, 98TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 845 n.72 (Comm. Print 1984). The section 132 regulations contain the same provision in almost identical language. Treas. Reg. § 1.132-2(a)(5)(ii) (1989).

[94] The same defense of committee reports and staff counsels in favor of cautious use of the "General Explanations" of tax legislation that is produced by the Joint Committee on Taxation (commonly known as the Blue Book). Although this material is not produced before the legislation is passed, it is a contemporaneous record of the understanding of the group most involved in drafting the legislation. It is unlikely that staff members would want to unsettle compromises and agreements made during the drafting negotiations. It has great potential utility to rule users. Complex statutes and the backlog of regulations leave rule users in a difficult position. The value of the guidance to fill the gap until regulations are available more than outweighs the danger of inaccuracy, especially since the courts can exercise the same judgment about misuse as they can with other legislative history.

Professor Livingston, in his extensive work on tax legislation and interpretation, reached the same conclusion.

> I recommend that the Blue Book be treated in a manner similar to the committee reports themselves. Where the Blue Book adds explanatory material, it should be as persuasive as similar material in the committee reports. . . . Where the Blue Book specifies detailed applications of the statute, it should be entitled to a presumption of correctness, but should not be followed if it is inconsistent with the underlying provision.

Livingston, *supra* note 90, at 885.

The cost of using legislative history as an interpretive tool increases research costs for rule users, but the expense of consulting relevant legislative history must be balanced against the cost of forgoing its use. While legislative history will not answer every question, it will definitively answer some questions, saving the costs associated with the unresolved ambiguity in the statute.[95] Even if the legislative history does not provide a single determinate answer, focusing on the purpose of a statute, including its legislative history, can narrow the possible choices as well as indicate which of those possible answers is the most probable. Concentrating on rule users would suggest that the most weight should be given to sources that are readily available and easier to find through reasonable research efforts. This would include committee reports and other formally produced documents, like statements of the managers of bills, debates during the consideration of the bill, and proposed and rejected amendments. Legislative history that is more burdensome to discover and less likely to be representative, such as isolated statements of single legislators that are not included in the floor debate, should be rejected. The sources that are the easiest to identify and find will be the least burdensome for rule users to collect,[96] and they are also the ones that have the highest indicia of accuracy.

The use of legislative history that I am suggesting is, at least in part, formalistic. As Professor Sunstein has pointed out, traditional statutory interpretation devices are inadequate, and other interpretive principles must be adopted.[97]

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[95] Costello, *supra* note 58, at 66. The use of legislative history reduces the costs of litigation. *Id.*

[96] In addition, the cost of using legislative history as an interpretive tool is significantly reduced for subsequent rule users. Once the case of first impression has been decided, the relevant legislative history will be identified and discussed. Therefore, the normal and unavoidable process of researching judicial decisions will lead the rule users to a statute's legislative history.

[97] Sunstein, *supra* note 9, at 412. Professor Sunstein points out that interpretive principles that "grow out of, and do not collide with, the basic purposes of the constitutional framework, of contemporary institutional arrangements, and of modern social and economic regulation" must be developed. *Id.*

The normative judgments that support these interpretive principles color how a statute will be interpreted.[98] Perhaps this description of legislative history does not completely mirror reality, but reality may be chaotic. At least recognizing legislative history as Congress's institutional voice has the value of encouraging open discussion of legislation and increasing predictability.

b. Structure

The structure of a statute also provides clues about its purpose. Each statutory body has a foundational construct that defines the basic goal of that area of law. For example, in her work on interpreting tax statutes, Professor Deborah Geier posits that one component of the purpose of the income tax is reflected in "the fundamental structure underlying the income tax. By 'structure,' I mean the theoretical construct that overarches the sum total of the entire Internal Revenue Code and is intended to be captured by it."[99] The tenets of this fundamental structure are nowhere specifically laid out or stated, but any knowledgeable observer of the federal tax code would recognize them. Professor Geier lists as examples the concepts that "the same dollars should never be taxed to the same person more than once or deducted by the same person more than once"[100] and "the notion that what we are trying to reach under an income tax is, essentially, consumption and net increases in wealth."[101] While Congress is, of course, free to violate the fundamental structure of an area of law, courts should question whether the literal language of the statute could bear a meaning that does not conflict with the overall structure of a body of law.

The structure formed by a body of law is a dynamic con-

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[98] *Id.* "When interpretative norms are contested . . . there is no alternative but to base the inevitably value-laden choice among them on their role in improving or impairing governmental performance." *Id.*

[99] Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 497 (1995).

[100] *Id.*

[101] *Id.*

cept and can evolve over time. Therefore "structure" is not forever anchored to the impetus of its first passage. For example, Professors Eskridge and Frickey have traced the changes in the underlying structure of federal law concerning Native Americans.[102] For a period Congress had adopted a federal policy that "force[d] assimilation of Native Americans, but that Congress had abandoned that policy in short order."[103] The hints as to "purpose" given by the structure of an area of law should include how the policies in those areas have evolved and should reflect the current structure of the statutory scheme.

In addition, the use of structure to discover clues about the correct application of statutes includes guidance that is given by internal context and by proper English usage and grammar. As Professor Popkin pointed out, "[w]hen we think of relying on internal context to determine the meaning of a statutory text, we think of applying such uncontroversial maxims as the principle that 'words grouped in a list should be given a related meaning.'"[104] This and other clues about statutory meaning taken from internal context reflect how users of English understand language.[105]

A conversational model, however, rejects the highly formalistic and unrealistic assumptions about congressional drafting that Justice Scalia uses in his textualist approach.[106] In reviewing Justice Scalia's opinions, Professor Popkin discovered that "Justice Scalia determines what statu-

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[102] Eskridge & Frickey, *Practical Reasoning*, *supra* note 1, at 374.

[103] *Id.* To that effect, the Ninth Circuit concluded that courts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Id.* (quoting Santa Rosa Band of Indians v. Kings Co., 532 F.2d 655, 663 (9th Cir. 1975)).

[104] Popkin, *Internal Critique*, *supra* note 27, at 1142 (quoting Third Nat'l Bank v. IMPAC Ltd., 432 U.S. 312, 322 (1977)). For example, Justice Stevens has held that when a word was "sandwiched between" two other terms, the terms should be construed as having a related meaning. *Id.* (citing *Third Nat'l Bank*, 432 U.S. at 324).

[105] *Id.* at 1142-43.

[106] *See generally id.* at 1142-52 (discussing Justice Scalia's assumptions about legislative drafting).

tory text means by presuming authorship by an ideal drafter who meets proper standards of style and grammar."[107] While Justice Scalia refers to how language would "naturally" be used, he is in fact applying an unreasonable standard that is idiosyncratic and manipulable.[108] Doctrinaire textualism also ignores the fact that legislation is never drafted by a single author, at one sitting, with ample time to draft and redraft to select exactly the perfect wording. Rather, drafting legislation is a group effort, written in bits and pieces, subjected to debate and change by others, and often completed in haste. Interpreting a statute as if it were drafted by a single "super author" who carefully conforms to all rules of proper style and grammar is unrealistic. Individual users of English cannot always meet that standard. Holding Congress to such a standard through a presumption that statutes are drafted with such care ignores what we know about the legislative process. Imposing this drafting standard ignores and undercuts rather than respects Congress's legislative authority. Instead of "putting on 'thick grammarian's spectacles and ignor[ing] the available evidence of congressional purpose,'"[109] a conversational approach would use the information provided by internal context and structure and would do so against the background of a realistic understanding of the process that produces statutory language.

2. *Judicial Sources of Meaning*

The sources of meaning already discussed are all rooted in congressional action. The language of the statute, the legislative history, the structure of the statute, and the evolution of the statute are products of Congress's exercise of its legislative authority. As such, these sources should be given substantial weight and deference by courts. These sources, however, do

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[107] *Id.* at 1143.

[108] *See, e.g.,* Church of Scientology v. IRS, 792 F.2d 153, 157-63 (D.C. Cir. 1986).

[109] Popkin, *Internal Critique*, *supra* note 27, at 1135 (quoting West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting)).

not always answer the question of statutory meaning in a particular context—leaving rule users with indeterminate results. Courts should adopt an interpretive methodology that allows rule users to rely on other sources of meaning to determine their obligations under statutes. Considerations of prior judicial interpretation, coherent results, and equality of treatment do not replace congressional primacy. Instead, they supplement congressional sources of meaning in a manner that provides rule users with better "notice" of what the government has said the statute means. It allows rule users to heed the statements of the courts and to place congressional statements in the context of the larger, on-going legal conversation.

Concern for rule users' ability to determine their obligations would suggest that courts should have a healthy regard for stare decisis. The benefits of stare decisis are stability, predictability, and consistency. A definitive ruling on the meaning of a statute ends many of the inefficiencies associated with ambiguous statutes. If courts do not respect prior opinions, then the cost of ambiguity continues indefinitely because rule users cannot trust judicial resolution. Unnecessary changes in the path of judicial interpretation reinject the types of inefficiencies that the original ambiguous statute caused.

Once a court has decided a case that interprets a statute, Congress then has its institutional opportunity to speak. If it does not do so, then other participants in the conversation—regulatory agencies, lower courts, and rule users—have a legitimate reliance interest in the court's interpretation of the law.[110] The equilibrium that has been reached after the courts have interpreted a statute in a manner that has become accepted, and that Congress has not changed, has valuable benefits that should only be sacrificed for a good reason. The interpretation of "reasonable compensation" in I.R.C.

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[110] This reliance interest is of course limited to situations where it is reasonable—Supreme Court decisions, consistent interpretations from multiple appellate courts, or long-standing and wide-spread district court agreement on statutory meaning.

§ 162, for example, has been interpreted to disallow the deduction for the payment of salaries that are unreasonably high.[111] The legislative history suggests that, far from disallowing the deduction of excessive salaries, such language was intended to allow a deduction of an amount of salary that was reasonable even if the salary was not paid.[112] The current interpretation, however, is well entrenched and fills a useful structural role by disallowing amounts that taxpayers denominate as salary but are in fact a different kind of payment disguised as salary.[113] Taxpayer and Internal Revenue Service expectations about the interpretation of this section are settled, and there is little to be gained by overturning that interpretation. Instead, cases should be overturned when a later statute changes the legal landscape, when the ill effects of an earlier decision manifest themselves, or when it becomes clear that the current interpretation conflicts with the overall structure of the area of law in an unanticipated way.[114]

Prior judicial opinions also come into play in the debate of whether legislative inaction suggests that Congress has acquiesced in the court's interpretation even though Congress has not actually expressed approval. Commentators have argued that legislative acquiescence is not an accurate description of Congress's intent.[115] In addition, the courts' application of

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[111] *See* Harold's Club v. Commissioner, 340 F.2d 861, 867 (9th Cir. 1965) (interpreting § 162(a) to disallow deduction of salary that is unreasonable).

[112] *See* Erwin N. Griswold, Note, *New Light on "A Reasonable Allowance for Salaries,"* 59 HARV. L. REV. 286, 287-89 (1945) (discussing legislative history of section 23(a)(I) of Internal Revenue Code of 1939, predecessor to current I.R.C. § 162(a)).

[113] Taxpayers have incentives to disguise various types of payments as salary, such as dividends, interest, or payments for property.

[114] This is similar to the standard suggested by Professor Eskridge that "statutory precedent might be overruled if its reasoning has been exposed as problematic and its results pernicious, *and* it has not broadly influenced subsequent lawmaking and private planning." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1385 (1988) [hereinafter *Overruling Precedents*].

[115] *See* Dickerson, *supra* note 49, at 1133; William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 (1988) [hereinafter *Legislative Inaction*]; Eskridge, *Overruling Precedents*, *supra* note 114, at 1402-09; John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture*

legislative acquiescence is incoherent.[116] Since this presumption of legislative approval is not consistently convincing, it should be rejected as an interpretive tool unless some alternative benefit or justification can be found.[117]

If, however, concern is refocused from the question of whether the courts are following Congress's will to concentrate on the needs of rule users, then the concept of legislative acquiescence is a statement about the appropriate roles of Congress and the courts. Even if Congress did not respond, it was Congress's "turn to speak," and its failure to do so has significance. Effectively, in this institutional conversation, Congress's choice to remain silent has ramifications regardless of whether Congress's silence was due to lack of awareness of the case, political cowardice, or institutional inertia. Instead of reflecting Congress's direction, legislative acquiescence implies that, until Congress acts, the courts are entitled to have the last word and that rule users can rely on the interpretation of the government participant that has spoken most recently. The value of legislative acquiescence, therefore, is similar to the value of stare decisis; it increases predictability and protects rule users' reliance interests.

Congress's institutional responses are slow and difficult. The concept that if the courts make incorrect decisions, Congress regularly can correct those mistakes in a timely manner is unrealistic.[118] Often court decisions will not come to the attention of Congress or will not trigger congressional action

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into "Speculative Unrealities," 64 B.U. L. REV. 737, 758 (1984). Grabow suggests that the primary flaw with the acquiescence argument is "Congress and its committees today do not and cannot take notice of all these statutory interpretations." Grabow, *supra*, at 758.

[116] Eskridge, *Legislative Inaction*, *supra* note 115, at 91-95.

[117] The use of presumed acquiescence may be especially troubling if it has the impact suggested by Professor Eskridge. His review of the acquiescence cases suggests that "the presumption of correctness might overprotect interpretations benefitting well-organized interests, too often at the expense of the general welfare . . . . [These] cases . . . have an asymmetrical, and unfair, impact on the development of legal rules." *Id.* at 114.

[118] *See generally* Brudney, *supra* note 40, at 21-37 (describing legislation process).

even if Congress knew of the decision.[119] Some cases, however, are sufficiently important and have been in place long enough that they have become accepted as foundational by rule users. In those instances, there is significant value in a presumption that long-standing judicial interpretations that have become woven into a body of law will not be overturned without a compelling reason. In that light, legislative acquiescence is not really a statement that Congress has in fact approved of a judicial interpretation, but it is an indication that some cases, or some lines of cases, are basic enough to an area of law and sufficiently long-lived that they should remain in place until either Congress in fact changes the statute or other circumstances change dramatically enough to justify a reversal of the courts' original interpretation.[120] This approach acknowledges the value of predictability but will not unnecessarily restrict the courts' ability to adjust its interpretations to changing circumstances. It leaves the responsibility for judicial decision-making with the court rather than shrugging that responsibility off onto Congress's shoulders by the mechanism of "presumed" congressional intent.

3. Dictionaries

Other sources that are not linked to congressional statements, to regulatory agencies, or to judicial precedent have been adopted as interpretive tools. Unlike congressional purpose and judicial precedent, these interpretive tools do not improve determinacy because they are manipulable and inaccessible to rule users. For example, although dictionary or ordinary usage definitions are useful in helping to determine the possible meanings of statutory language, they are not particularly useful in identifying the best or most probable

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[119] The attention paid to cases may vary from committee to committee. For example, due to budget pressures the Finance and Ways and Means Committees need to track decisions in the tax area to estimate revenues. These committees appear to be quite aware of important tax decisions.

[120] For a good example of this approach see Justice O'Connor's concurring opinion in Commissioner v. Tufts, 461 U.S. 300, 317 (1983).

answer.

The limitations of relying on dictionary or ordinary meaning has been well established.[121] A recent Harvard Law Review Note explores the increasing use of dictionaries by the Supreme Court and the problematic nature of that reliance.[122] Reliance on dictionaries to establish "ordinary meaning" automatically assumes that dictionaries reflect "the best source of the common understanding of words."[123] This elevates an external, secondary source above primary, statutory sources such as context.[124] Such reliance also ignores that dictionaries disagree about the definition of words, that words may have multiple meanings, and that the meanings of words change over time. Unless these problems are addressed "dictionaries can mask fundamental arbitrariness with the appearance of rationality and make the subjectivity of judicial decisions even more difficult to confront."[125] Turning to sources other than dictionaries will give rule users a better guide and a richer understanding of an area of law than mechanically assigning a dictionary meaning to statutory language.

4. Canons of Construction

Canons of construction also have limited utility in providing guidance for interpreting statutory ambiguity. Judge Posner has divided canons of construction into three categories and discussed their limitations. The first category "consists of rules for reading texts in general."[126] Judge Posner points out that some of these canons impose a way of understanding

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[121] Cunningham et al., *supra* note 4, at 1563; *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1445 (1994) [hereinafter *Looking It Up*] (stating that "dictionaries are neither as neutral nor as reductive as the Court supposes them to be").

[122] Note, *Looking It Up*, *supra* note 121, at 1437-38.

[123] *Id.* at 1442.

[124] *Id.* at 1445.

[125] *Id.* at 1446.

[126] Posner, *Interpretation Primer*, *supra* note 49, at 442. Posner refers to these as "*reading* canons." *Id.*

texts that is artificial and does not reflect the "way people do or should read."[127] Others are simply unnecessary because "[t]he canons to the extent valid are generalizations about competent reading. The competent do not need them, any more than they need a handbook on English grammar."[128] The other two categories are rules that reflect policy judgments. "Legislative-policy" canons reflect presumptions about how Congress would want its statutes interpreted.[129] Judge Posner points out that these canons do not realistically carry out legislators' preferences and may even "wreck the compromise" between interest groups that is reflected in a statute.[130] In his last category of canons, Judge Posner again highlights that these canons do not actually reflect Congress's preferences. Instead, they reflect "judicial sympathies and aversions."[131] Although canons can act as useful reminders of "a checklist of relevant considerations for a judge to consult before making up his mind about the meaning of a statute,"[132] they are "hardly formulaic, and perhaps [they are] a little too intuitive, too obvious, to be a helpful systematization of interpretive methodology."[133]

Using canons of construction to determine statutory meaning also defeats the purpose of making the interpretation accessible to rule users. Justice Scalia defends the use of selective canons on the grounds that adopting a uniform set of background rules will give Congress better guidance on how the courts will interpret statutes.[134] Once again, this focuses

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[127] *Id.*

[128] *Id.* Moreover, Posner suggests that "[t]he incompetent are unlikely to be able to apply them." *Id.*

[129] *Id.*

[130] *Id.* Professor Macey has also noted that "some . . . canons enhance the efficacy of hidden special interest bargains by increasing the probability that the bargains will be enforced in the courts." Macey, *supra* note 1, at 265. Canons can cause both over and underenforcement of statutory language.

[131] Posner, *Interpretation Primer*, *supra* note 49, at 443.

[132] *Id.*

[133] *Id.* at 443-44.

[134] Finley v. United States, 490 U.S. 545, 556 (1989). Justice Scalia noted that this approach prevents "confusion." *Finley*, 490 U.S. at 556.

attention on some of the participants in the conversation while ignoring others. Canons of construction are much less accessible to rule users than are legislative histories, and determining when they will be applied by the courts is almost impossible. If, as textualists assert, the goal of a statutory interpretation method is to allow rule users to determine their obligations from the face of the statute, canons of construction are the most problematic interpretive tool.

Many canons include some interpretive norm that, if consistently applied, would make statutory interpretation more determinate. The benefit of such rules is undercut because many canons reflect competing if not completely opposed norms.[135] This aspect of canons has subjected their use to criticism because their application is arbitrary and indeterminate.[136] Pretending that a particular canon of construction forced the decision merely masks the court's responsibility for its decision.[137] Reliance on canons without discussion why a particular canon is chosen hides the fact that there is an interpretive step and a value choice involved in selecting which canons to adopt.[138] Professor Eskridge's work on the public

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[135] Posner, *Interpretation Primer*, *supra* note 49, at 443; *see also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (listing examples of competing canons).

[136] Eskridge, *New Textualism*, *supra* note 48, at 675-76.

[137] Macey, *supra* note 1, at 264. The selection from among competing canons

> enhance[s], rather than limit[s], the power of judges to engage in willful statutory interpretation. A judge who invokes a canon of construction to defend a particular reading of a statute masks his willfulness under a cloak of legitimacy, because he appears to be using a neutral, rather than a result-oriented, source to support his result.

Id.

[138] Professor Sunstein's work on canons is valuable because he explicitly recognizes this step and justifies his canons on the value of their content. "All of the principles described here have justifications deriving from the constitutional backdrop, the promotion of sound institutional arrangements, and the prevention of statutory irrationality and injustice." Sunstein, *supra* note 9, at 463-64. If an interpreter attempted to apply Professor Sunstein's canons in a mechanical manner, they would suffer from the same weaknesses as traditional canons. Some of his canons conflict and choices must be made about which canon to adopt. For a criticism of Professor Sunstein's canons, see Eben Moglen & Richard J. Pierce,

values represented in canons that set forth "clear statement" and other rules suggests that canons are often applied selectively and with a troubling bias. He discerns a pattern in which powerful and well-established litigants who are "repeat players"[139] disproportionately reap the benefits of the application of canons of construction.[140]

Canons of construction are based on artificial assumptions about how ambiguous statutes should be interpreted. They do not reflect any institutional statement that Congress has made. Like Congress's presumed knowledge of court decisions in legislative acquiescence, Congress has not demonstrated an actual knowledge or acceptance of an approved list of canons of construction. If canons are to serve as part of the conversation, they must have some independent justification for acceptance. Unlike legislative acquiescence, adopting canons of construction as background understanding for our institutional conversation does not increase a rule user's ability to predict how ambiguous statutory language will be interpreted. Because of the competing values that are reflected in canons of construction and their ability to be manipulated, they are likely to decrease the ability of both rule users and lower courts to determine what appellate courts will decide, and thus, they should be rejected as an interpretive tool.

5. Impact of Judicial Decisions

Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990). If an interpreter uses Sunstein's canons not as a mechanical way to avoid decision-making responsibility, but as a way of expressing certain values, then his canons play an inherently different role from traditional canons of interpretation. This approach seems to be more consistent with what Professor Sunstein intends. Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1253-56 (1990).

[139] Repeat players are "the government, corporations, and well-funded interest groups." Eskridge, *Public Values*, *supra* note 9, at 1090.

[140] *Id.* at 1083-91. This pattern would be especially troubling in an area such as tax where the government drafts the rules, reaps the benefits of those rules, and is a constant repeat player. In addition, because of current budget pressures, a judicial decision in favor of the government may be less likely to be overturned than an incorrect decision in favor of a taxpayer.

In addition to statements made by Congress, the courts, and regulatory agencies, judges should also consider the impact of their decisions when interpreting ambiguous statutory language. Although concern with the impact of a judicial opinion is not linked to specific statements made by the governmental participants in the conversation, tailoring a decision to conform with other areas of law is merely placing this judicial statement in the broader context of the overall legal conversation. If language is indistinct and one possible interpretation of a statute will create a more coherent fit with related areas of law, or will cause similar transactions or situations to be treated in a similar way, then the court should weigh that factor heavily in its determination of what the statute means. This self-conscious attention to outcome should reduce unintended upheaval in related areas of law. Moreover, it will limit dissimilar treatment of equivalent circumstances to situations where Congress has specifically required that outcome. By focusing on the outcome of a case, its implications in other areas of law and whether similar situations are treated alike, courts can improve rationality and coherence in the law. Acknowledging the importance of the consequences of decisions also reinforces important equality concerns and values.

III. Application

Once the court has identified all of the relevant statements from the various participants in the conversation concerning the possible interpretations of an ambiguous statute, it must determine how the statute should apply to a particular controversy. At this stage of the interpretive process, the focus of a conversational model shifts from the impossible task of recreating what Congress would have done. Instead, the court should ask what a reasonable rule user would believe the statute means after weighing all the relevant statements. The court, therefore, is not acting as an agent of Congress; it is acting as a mediator between rule users who are now contesting the application of the statute.

Judicial decision makers should evaluate the direction,

clarify, and importance of the various parts of the conversation. The direction of a statement refers to which of the possible meanings of the statute it would support. The clarity of the statement measures how strongly the statement points in a particular interpretive direction. The importance of a statement identifies the formality of a statement and determines how much deference that statement deserves. A conversational model cannot produce a hard and fast ranking of each statement because each statement's importance depends on more than one factor. While a committee report is an important congressional statement and, generally, is deserving of deference, it could point in more than one direction, or it could point in one direction but only weakly. In that case, the committee report would not be very helpful in predicting the meaning of the ambiguous statute and should be given less weight than other statements that are more determinative. Alternatively, a statement in a committee report could point strongly in one direction, but could be less important and less deserving of deference because it does not refer to the statute that is being enacted or amended. If the statutory language is more general, its implementive purpose may be less clear or helpful. In those cases, ultimate purpose and outcome are relatively more important.[141] In short, the court should weigh the statements that are available for their utility in answering the ambiguity posed by statutory language.

The application of a conversational model will, in some cases, easily lead to a determinate answer. If several statements point strongly toward one interpretation, and no statements point strongly in another direction, then courts can

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[141] For example, the definition of "gross income" in I.R.C. § 61 is very general and does not give specific implementive directions. The structure of the tax code, the ultimate purpose, and the reasonableness of the outcome all become relatively more important. This leads to interpretations of gross income that include the "claim of right" doctrine and the tax benefit rule. *See, e.g.*, Hillsboro Nat'l Bank v. Commissioner, 460 U.S. 370, 372 (1983) (finding that "the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction"); North Am. Oil Consol. v. Burnet, 286 U.S. 417, 423 (1932) (holding that taxpayers must include amounts received under claim of right in year funds are received).

solve the ambiguity fairly easily. In other cases, as with any interpretative methodology, the outcomes will be a close call. Below I apply a conversational methodology to several different types of statutory ambiguity.

A. Indistinct Language

Statutes that are not sufficiently precise to limit their meaning to only one possible interpretation pose the most difficult ambiguity. Because this type of ambiguity is the most open ended, it has the widest range of sources that provide evidence of the statute's meaning. Rule users need to identify the range of possible meanings and a method of predicting the most probable one. The statute's legislative history, structure, and prior judicial interpretation, the treatment of similar situations, and the impact of the outcome, as well as other factors, provide valuable clues to the rule user.

For example, in *Cottage Savings Ass'n v. Commissioner*[142] most of the relevant statements pointed in the same direction. The taxpayer (bank) sold participation interests in a pool of mortgages on which it had suffered losses.[143] It also simultaneously purchased participation interests in other pools of mortgages.[144] The mortgages in all of the pools were similar in all respects. They were made up of loans secured by single-family, residential properties from the same state with equivalent maturity dates and interest rates.[145] For purposes of the Federal Home Loan Bank Board (FHLBB) regulations, the sale was not treated as generating a loss for financial record-keeping purposes.[146] For tax purposes, the taxpayer treated the sale of the participation interests in its pool of

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[142] 499 U.S. 554 (1991).

[143] *Cottage Sav. Ass'n*, 499 U.S. at 556.

[144] *Id.* at 557.

[145] *Id.* at 557-58. The fair market value of the interests acquired by Cottage Savings was approximately $4.5 million, and the face value of the mortgage interests it sold was $6.9 million. *Id.* at 558.

[146] *Id.* at 557. Under a FHLBB regulatory directive, savings and loans were not required to report losses resulting from mortgages which were exchanged for "substantially identical" mortgages. *Id.*

mortgages as a "sale or other disposition" under I.R.C. § 1001 and deducted a loss under I.R.C. § 165.[147] Because the interests given up on the sale and those repurchased were extremely similar, the Commissioner disallowed the loss deduction.[148] The issue before the Court was whether the sale of the interests in the bank's mortgage pool gave rise to a realized loss.

The Court reached the correct decision in allowing the loss deduction. Stripped of its artificial legislative reenactment language, the decision is also a good example of the strength of a conversational approach. The majority of the Court openly acknowledged the ambiguity caused by the indistinct language.[149] Justice Marshall's opinion then skillfully explored the structural role of the "realization event" requirement in the tax code and determined that treating the sale of the interests in the mortgage pool as a disposition was consistent with the purpose of the realization requirement.[150] The Court also correctly analyzed the implementive structure of other sections within the code. Interpreting the realization event in the manner urged by the Commissioner would completely eviscerate the need for I.R.C. § 1031, which provides that gain or loss will not be recognized on like-kind exchanges.[151]

Treating the sale as a realization event was also consistent with long-standing judicial precedent and regulations that had not been overturned by Congress.[152] The Court's

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[147] *Id.* at 558.

[148] *Cottage Sav. Ass'n*, 499 U.S. at 559-60. The Commissioner asserted that the exchange of the mortgage interests did not amount to a "disposition of property" because the properties exchanged were not materially different. *Id.*

[149] *Id.* at 560. "Neither the language nor the history of the Code indicates whether and to what extent property exchanged must differ to count as a 'disposition of property' under § 1001(a)." *Id.*

[150] *Id.* at 559, 565-66.

[151] *Id.* at 566. The Court reasoned that if "Congress had expected that exchanges of similar properties would not count as realization events . . . , it would have had no reason to bar recognition of a gain or loss realized from these transactions." *Id.*

[152] *Id.* at 561-65. Congress has changed the result of some of those cases in a very specific way. Arguably, this strengthens the Court's decision since Congress

opinion, however, structures this argument as a presumption of congressional approval.[153] A conversational approach would have valued these statements from the other participants in the conversation (agencies and courts) on their own merits and not because of artificially presumed congressional knowledge or approval. Rather, the relevant regulatory agency and courts had a legitimate role in the conversation and their statements should be respected, and rule users should be able to rely on them until they are reversed in an institutionally appropriate manner.

The "reenactment" logic links these cases to a presumed but questionable congressional intent. That linkage suggests that the courts could not act to overturn their prior decisions under these circumstances. Instead, Congress must act to overturn the cases upon which courts presumptively relied. Hiding behind the role of congressional agent silences the courts' legitimate voice in the continuing development of the law by instituting a type of super stare decisis for older cases. For example, if the tax code changes such that "realization" plays a different structural role, the Court should be free to change its interpretation of what qualifies as a realization event. In this respect a conversational approach is dynamic, but the evolution is tied to congressional action. In effect the Court is saying "given what Congress has said about how the tax code works, this is what realization means." If Congress then speaks in such a way that modifies how the tax code functions, the Court should be free to consider whether those changes alter the meaning of "realization." The judicial definition of realization should not be unchanging regardless of the alteration of the structure around it simply because Congress is presumed to be aware of and to adopt judicial determina-

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addressed exactly this problem and only altered the outcome of those cases in limited ways. But resorting to those less determinate congressional clues is not necessary in this case.

[153] *Cottage Sav. Ass'n*, 499 U.S. at 561-62. These presumptions are used when they bolster the court's decision and are ignored when they are inconvenient. They are not determinate and, therefore, add little to the persuasiveness of the reasoning of the case.

tions.

Lastly, the outcome reached by the Court in *Cottage Savings* would not create conflicts with other areas of law. Contrary to the dissenting opinion, treating the sale of participation interests in the mortgage pool as a realization event for tax purposes does not clash with the FHLBB regulation that does not require the loss to be recognized for financial reporting purposes. The differing treatment under the two sets of regulations does not create unwarranted checkerboarding. Instead, the different treatment for tax and financial reporting is reasonable since the regulations in each area are concerned with very different issues. The tax code is interested in determining an appropriate time to measure gain and loss. The FHLBB is interested in maintaining bank solvency. A different standard of when to measure and account for losses on the bank's mortgage pools for tax and financial reporting purposes, therefore, is justified.

In short, the relevant statements from the participants in the conversation would convince a reasonable rule user that the disposition of the interests in the mortgage pool would entitle a taxpayer to a loss deduction. The language of the statute was indistinct, and the legislative history did not provide a determinate answer. The structure of the statute, longstanding case law, and Treasury Department regulations all suggested that the taxpayer's position was correct. Thus, all the statements about the meaning of this statute either support the taxpayer or are indeterminate. Based on the evidence of statements about what the statute means, the Court's interpretation is not only possible, but it is the most probable outcome.

The more difficult decisions involve controversies in which the statements about statutory meaning are unclear or conflict with one another. In such circumstances, the Court must weigh the importance and the clarity of each statement. These are perplexing cases where the Court cannot identify an outcome with a clear preponderance of evidence pointing toward one meaning. Unfortunately, these cases also tend to produce decisions that overstate the import of legislative history and,

thus, are unpersuasive. For example, in *Commissioner v. Engle*,[154] the Court was faced with interpreting the I.R.C. § 613A limitation on depletion deductions.[155] Both the majority and the dissent in the five to four opinion discussed the legislative history of I.R.C. § 613A extensively, but each side reached a different conclusion.

At issue in the case was the availability of percentage depletion deductions for certain lease bonus and advance royalty payments.[156] Prior to the Tax Reduction Act of 1975,[157] holders of economic interests in mineral deposits could take deductions based on a percentage of gross income generated from the property.[158] After 1975, the percentage depletion deduction was limited by I.R.C. § 613A to certain amounts of oil and gas produced by independent producers and royalty owners.[159] The taxpayers were entitled to receive certain payments regardless of whether any oil and gas was actually produced.[160] On receipt of these payments the taxpayers claimed depletion deductions, and the Commissioner disallowed the deductions.[161]

The relevant statutory language does not address this issue directly, and the Court acknowledged that the language of the statute was indistinct.[162] The majority opinion stated "Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of

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[154] 464 U.S. 206 (1984).

[155] *Engle*, 464 U.S. at 208.

[156] *Id.* at 212. The respondents had assigned their oil and gas leases to third parties, but retained overriding royalties. *Id.* They received $7600 in advance royalties. *Id.* The respondents claimed a percentage depletion deduction equal to twenty-two percent of the advance royalties. *Id.*

[157] Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (codified as amended in scattered sections of I.R.C.).

[158] The effective date of the I.R.C. § 613A limitation was January 1, 1975. Tax Reduction Act of 1975 § 501(c).

[159] I.R.C. § 613A (1994).

[160] *Engle*, 464 U.S. at 212.

[161] *Id.* The Commissioner "disallowed the deduction because the advance royalties were not received 'with respect to any average daily production' of oil or gas." *Id.*

[162] *Id.* at 217.

being most harmonious with its scheme and with the general purposes that Congress manifested.'"[163] Unfortunately the amendment of I.R.C. § 613A did not produce a full-blown discussion in committee reports or other types of legislative history. No change to the depletion deduction was included in the bill produced by the House Ways and Means Committee. The provision to end the percentage depletion deduction was added as an amendment to the bill during the debate in the House.[164] The exception for independent producers was added during debate in the Senate.[165] With some minor changes, the Conference Committee included the Senate amendment in the compromise legislation that passed both houses.[166]

Justice O'Connor's opinion engaged in the bad habit of extrapolating an ultimate purpose for the statute, and an answer to the specific issue presented, from limited congressional statements. Justice O'Connor interpreted the preservation of the depletion deduction for independent producers to mean that Congress wanted to maximize the subsidy to those producers.[167] The dissent's reading of the legislative history led it to a different ultimate purpose and different result under I.R.C. § 613A that is equally well supported by the limited legislative history that is available.[168] Far from intending to maximize the subsidy, the dissent points out that Congress was significantly curtailing the subsidy even to independent producers.[169] Ultimately neither the majority nor the dissent has a convincing argument based on legislative history, because while it is clear that Congress intended to cut back the percentage depletion deduction, it is also clear that it wanted to preserve a portion of the deduction for independent producers. Depending on which of those "intents" the reader focuses

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[163] *Id.* (quoting NLRB v. Lion Oil Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

[164] *Id.* at 220; *see* 121 CONG. REC. 4651-52 (1975).

[165] *Engle*, 464 U.S. at 220; *see* 121 CONG. REC. 7813 (1975).

[166] *Engle*, 464 U.S. at 220-21.

[167] *Id.* at 217-22, 225-26.

[168] *Id.* at 228 (Blackmun, J., dissenting).

[169] *Id.* at 231-32 (Blackmun, J., dissenting).

on, the result is very different. Ultimately, the majority and the dissent should have admitted that Congress did not express a clear intent on this specific type of payment, and its more general intent expressed in the floor debates simply does not answer the question.

Other important indicators of meaning either point in different directions or do not provide any guidance. For example, the structure of the Internal Revenue Code is not helpful in answering this specific question. Because I.R.C. § 613A is a tax expenditure and not part of the revenue-raising, definitional part of the tax code,[170] the structural framework of an income tax does not provide any clues about the meaning of the section.

The dissent correctly highlights that the internal structure, and the implementive purpose of that structure, is difficult to square with the result reached by the majority.[171] The limitation in I.R.C. § 613A is tied to the amount of production. Applying those limitations to payments that are not linked to production is problematic. The majority, however, has longstanding judicial precedent that suggests its interpretation is the right one. The argument is overstated in terms of legislative reenactment, but nonetheless suggests the taxpayer's interpretation is appealing.[172] Prior to the amendment of the statute, the same issue presented by advance payments that were not linked to production arose and was answered in favor of the taxpayer in the 1934 case *Herring v. Commissioner*.[173] Even though deductions based on percentage depletion must ultimately be linked to actual production, taxpayers were allowed to take depletion deductions on advance pay-

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[170] *See* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985) (discussing distinction between tax expenditures and structurally necessary portions of the Internal Revenue Code).

[171] *Engle*, 464 U.S. at 229-30 (Blackmun, J., dissenting).

[172] *Id.* at 225. The Court noted that taxpayers, for the past fifty years, had been able to claim an allowance on all income derived from their oil and gas properties. *Id.*

[173] 293 U.S. 322 (1934).

ments before any production took place.[174] If production never occurred the deduction amount would be recaptured.[175] "Our cases have taken a longrun view of the relations between income and production, and we have interpreted the Code to allow percentage depletion on all income so long as actual extraction eventually occurs."[176]

Contrary to the tone and content of both the majority and the dissent, the issue presented in *Engle* is an extremely close one. In the absence of the prior judicial decisions, the dissent would have the stronger argument based on the structure of the limitation in I.R.C. § 613A. If prior cases had not dealt with such a closely related issue that presented the same structural difficulty, the majority's point would be less convincing. On balance, while internal structure is a direct statement from Congress and, therefore, more deserving of deference, the structure in this instance does not give a clear answer. Furthermore, the statute presented the same ambiguity before and after the amendment. The prior judicial precedent answered the question directly, had not been questioned as flawed, and provided for a mechanism to accommodate the internal structure. Focusing on the reasonable expectations of rule users would tip the balance in favor of the majority's position.

A conversational approach would have explicitly recognized that what Congress "said" in the legislative history was simply too general to answer the specific question about the treatment of advance payments that are not tied to production. In addition, statements made during debates on the floor when the amendments were discussed were less reliable than more formal congressional documents. The court, therefore, would have based its decision on other indicia of meaning. A consistent application of this approach would have freed the court and rule users (the taxpayer and the Commissioner) from divining congressional meaning from scraps of legislative

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[174] *Engle*, 464 U.S. at 209-10.
[175] *Id.* at 210 (citing Douglas v. Commissioner, 322 U.S. 275, 285 (1944)).
[176] *Id.* at 225 (citing *Douglas*, 322 U.S. at 275).

history and allowed them to focus on more determinative statements. For example, perhaps a fuller exploration of the prior cases would have demonstrated that the adjustment mechanism included in those cases was unworkable under the new limitation. This would have undercut the majority's position and supported the Commissioner.

In some cases, a conversational model of decision making would not only change the method of analysis but would also reach a different result. For example, in *Commissioner v. Schleier*,[177] the Court was faced with the issue of the tax treatment of an age discrimination award of back pay and liquidated damages.[178] I.R.C. § 104 provides that damages "received . . . on account of personal injuries or sickness" are excluded from a taxpayer's gross income.[179] In one portion of its opinion, the Court focused its attention on language from the statute that requires damages be received "on account of" the personal injury and found that neither the back wages nor the liquidated damages were received "on account of" a personal injury.[180] The damages, therefore, could not be excluded even if age discrimination were a personal injury.[181]

In explaining this holding, the Court described a personal injury case involving an automobile accident in which the injured party receives damages for medical expenses, lost wages, and pain and suffering.[182] Each of these elements of damages would be excludable, according to the Court, "not simply because the taxpayer received a tort settlement, but rather because each element of the settlement satisfies the requirement set forth in 104(a)(2) . . . that the damages were

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[177] ___ U.S. ___, 115 S. Ct. 2159 (1995).

[178] *Schleier*, 115 S. Ct. at 2161.

[179] I.R.C. § 104(a)(2) (1994).

[180] *Schleier*, 115 S. Ct. at 2164. This case considered several issues under I.R.C. § 104(a)(2). For purposes of illustrating the difference between my method and the Court's approach, I focus on the Court's interpretation of the "on account of" language in I.R.C. § 104(a)(2).

[181] *Id.* at 2166-67. The Court held that age discrimination is not a personal injury. *Id.*

[182] *Id.* at 2163-64.

received 'on account of personal injuries or sickness.'"[183] The Court then turned to the age discrimination suit damages and held that the damages were not excludable because "no part of respondent's recovery of back wages is attributable to that injury."[184] The Court went on to explain that

> [i]n age discrimination, the discrimination causes both personal injury and loss of wages, but neither is linked to the other. The amount of back wages recovered is completely independent of the existence or extent of any personal injury. In short, § 104(a)(2) does not permit the exclusion of respondent's back wages because the recovery of back wages was not "on account of" any personal injury and because no personal injury affected the amount of back wages recovered.[185]

The Court's analysis determined that the "on account of" language from the statute requires additional linkage among the underlying suit (negligence or discrimination), a personal injury caused by the suit, and each element of the damage award.[186]

A conversational approach would have analyzed this issue from the *Schleier* case very differently. Because the direction from Congress is unclear, the Court, by necessity, exercises more discretion in articulating the "meaning" of this type of statute. First, the decision maker would acknowledge that the language and purpose of I.R.C. § 104 is unclear.[187] Neither the implementive nor the ultimate purpose of the provision can be determined from its language or its legislative history.[188] In addition, the structure of the tax code does not provide any guidance in interpreting I.R.C. § 104.

While lower court opinions and its own prior opinions are

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[183] *Id.* at 2164.

[184] *Id.*

[185] *Schleier*, 115 S. Ct. at 2164.

[186] *Id.*

[187] The majority in United States v. Burke, 504 U.S. 229, 234 (1992), explicitly stated that the language of I.R.C. § 104 was indeterminate.

[188] Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 465-67 (1993).

not "binding" on the Court in the sense of precedent that must be followed, they, however, should be considered because they offer a collected body of wisdom about how courts applied the statute in various situations. In addition, rule users may have come to rely on a certain approach or interpretation from long usage in multiple forums. If there is a consistency of interpretation in the lower courts, the Supreme Court should consider whether a different solution that it could fashion would be a significant improvement over the approach taken in the prior decisions. If it is not, then the value of predictability to rule users should convince the Court not to substitute its assessment for that of the lower courts.

In *Schleier*, previous judicial interpretations of I.R.C. § 104 should have discouraged the Court from interpreting "on account of" as requiring more than that the damages flowed from the personal injury suit. In its decision in *Burke* just three years earlier, the Court strongly suggested that once the Court finds a claim is for a "personal injury," then all the damages (with the possible exception of punitive damages) received from that suit will be excluded.[189] Even if *Burke* had not been decided the Court should have taken that position. Except for the specific question about back pay, lower courts had consistently taken the approach that they did not distinguish between types of compensatory damages; rather, once the suit was determined to be a "personal injury" suit, all the damages received were excluded.[190]

Lastly, the Court should consider whether its decision will generate coherent results in similar situations so that the

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[189] *Burke*, 504 U.S. at 234. The majority in *Burke* did not raise the issue that the back pay may have been received from a personal injury and not have been "on account of" that personal injury. *Id.* In addition, the majority deferred to the Treasury regulation that had consistently been interpreted as requiring only that the damages be received "through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement." *Id.* (quoting 26 C.F.R. § 1.104-1(c) (1991)). The dissent in *Schleier* correctly pointed out that this is a significantly new reading of that language. *Schleier*, 115 S. Ct. at 2169 (O'Connor, J., dissenting).

[190] *See Schleier*, 115 S. Ct. at 2167-68, 2170-72 (O'Connor, J., dissenting) (discussing prior interpretation of I.R.C. § 104).

Court does not add to arbitrariness in the law. Focusing specifically on the back pay issue, a conversational approach would allow it to be excluded as well. Although there is not the same consistency of lower court interpretation, the justification for treating back pay differently from other types of damages is weak. The language of the statute does not draw any distinction between types of damages. Without some indication to the contrary, that language should prevail. In addition, treating back pay differently from other similar damages in personal injury suits, like lost earnings, draws an arbitrary distinction. A conversational model would reject a possible meaning that leads to incoherent results and that would not improve guidance to rule users and lower courts.[191] While none of the statements about the meaning of this language is especially strong, they all point in the same direction. Rule users, therefore, should not have their reliance on previous interpretations upset.

The use of sources other than text should not be controversial when the statutory language is indistinct. Courts and rule users can identify this type of ambiguity on the face of a statute. Any method of interpretation must use external sources in situations where the language is not sufficiently determinate to ascertain how the statute applies to a specific situation. A conversational model selects and utilizes sources in a manner

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[191] Similarly, a conversational approach would have rejected the definition of "tort or tort-type" injury adopted in *Burke*. Looking to the remedies available to determine if a suit is a personal injury draws arbitrary distinctions not required by the statutory language and generated more confusion than guidance to the lower courts. For example, the result of *Burke* is to distinguish between and treat differently not only different kinds of statutes against discrimination based on race, sex, and age, but also within the same type of discrimination. Race discrimination suits are excludable. *Burke*, 504 U.S. at 239. The I.R.S. issued a ruling that disparate treatment but not disparate impact sex discrimination awards could be excluded. Rev. Rul. 93-88, 1993-2 C.B. 61. The result of *Burke* was not an increase in predictability. The circuits immediately split on how to treat the very closely related issues of age discrimination. *Compare* Schmitz v. Commissioner, 34 F.3d 790, 794 (9th Cir. 1994) (holding ADEA establishes tort-like cause of action and damages are excluded from taxation) *with* Downey v. Commissioner, 33 F.3d 836, 840 (7th Cir. 1994) (holding ADEA liquidated damages are not excluded from taxation).

that is respectful of Congress's legislative prerogative but does not abandon the rule user to rootless speculation when Congress has not spoken clearly.

B. Conflict Between Language and Purpose

Unlike indistinct language and conflicts between statutes, ambiguity caused by a conflict between the literal language of a statute and its purpose is not manifested on the face of the statute. This type of ambiguity is more controversial because it unsettles what appears to be determinate language. Closer analysis of the types of disputes that arise in this area, however, demonstrates that interpreting statutes based on purpose rather than literal language is often more troubling in theory than in practice.

Professor Sunstein and others have asserted that finding statutory purpose is an act of "invention rather than discovery"[192] and that legislative intent and purpose are fictions in hard cases.[193] While it is true that finding statutory purpose requires judges to engage in a creative undertaking, "purpose," as it is used here as an interpretive tool and not as a foundationalist interpretive methodology, is not manufactured from the whole cloth of judges' imaginations or preferences. Rather, judges and rule users can uncover guidance as to purpose from legislative history, from the overall structure of a statutory scheme, and from how the statute developed over time. For example, a significant departure from the literal language of the statute in the legislative history should suggest the possibility that some of the words used in the statute are terms of art, a mistake was made in drafting, or that the words chosen were not sufficiently precise to convey fully what was intended.[194] If the purpose suggested by these sources conflicts with the language of the statute, then judges should acknowledge that the language has more than one possible meaning.

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[192] Sunstein, *supra* note 9, at 428.

[193] *Id.* at 433.

[194] Alternatively, there could be an error in the legislative history.

The literal language of a statute is sometimes rejected because it simply leads to the wrong result. For example, I.R.C. § 1012 defines "basis" as "the cost of such property."[195] The literal reading of that language would lead a court to determine that the cost of the property is "the fair market value of the property *given* in the exchange," because that is the "economic value relinquished."[196] In a seminal and long-respected case, the Court of Claims, however, reached the opposite conclusion and held that "the cost basis of property . . . is the fair market value of the property *received* in the exchange."[197] The court based its decision on the structure of the tax code.[198] It adopted the reasoning that "'[c]ost' is a tax concept and must be considered in the light of the designed interrelationship of [the sections of the code that determine gain and loss], and the prime role that the basis of property plays in determining tax liability."[199] Defining cost basis to mean the value of the property received was necessary to avoid over or under taxation on the disposition of property. Ignoring the context and undercutting the structure of a statutory scheme by engaging in a literal language interpretation uses the letter of congressional legislative primacy to violate its spirit.

Even if a consistently applied literal language interpretation would increase predictability, in some circumstances, it would also increase other inefficiencies. An overly rigid literal interpretation risks ignoring the result Congress intended to have govern and, thus, will enforce the wrong rule. The consequences will either be resources wasted due to incorrect implementation of the statute or congressional rsources wasted in correcting the court's misinterpretation.[200] Second tier predictability may also be improved by a nonliteral interpretation in

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[195] I.R.C. § 1012 (1994).

[196] Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184, 188 (Ct. Cl. 1954).

[197] *Philadelphia Park Amusement Co.*, 126 F. Supp. at 188.

[198] *Id.*

[199] *Id.*

[200] *See generally* Brudney, *supra* note 40, at 11-20 (discussing cost of congressional resources).

circumstances where the literal language conflicts with the purpose of a statute. A pattern of interpretive precedent based on purpose would justify taxpayer reliance, the correct results would be reached, and Congress would not need to amend the statute.

Not all conflicts between language and purpose should be decided in favor of literal language. Some nonliteral interpretation is more respectful of congressional will and more efficient than literal interpretation. The task for judges is to decide when a nonliteral interpretation is appropriate. The fundamental statutory scheme and the implementive purpose of a statute are determined by congressionally enacted language. A conflict between that structure or implementive purpose and the language of a statute, therefore, is comparable to a situation where the language of two statutes clash.

Friction between the statutory language and the structure of a statute should be resolved in much the same way as a conflict between two statutes. For example, the Ninth Circuit, in *Albertson's, Inc. v. Commissioner*, was faced with a conflict between the language of I.R.C. § 163 (interest deduction), the structural provisions for the treatment of deferred compensation arrangements, and the structural provisions for accrued but unpaid interest.[201] Albertson's entered into deferred compensation contracts with several of its key employees and independent contractors.[202] The contracts provided that certain payments of salaries, bonuses, and directors fees would be paid after a specified period of time.[203] The employees and independent contractors would also receive an additional amount to compensate them for the time value of the deferred compensation.[204] Albertson's argued that these additional amounts were interest, and they should be allowed a current deduction under I.R.C. § 163 that provides "[t]here shall be allowed as a

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[201] Albertson's, Inc. v. Commissioner, 38 F.3d 1046 (9th Cir. 1993) [hereinafter *Albertson's I*], *vacated in part*, 42 F.3d 537 (9th Cir. 1994) [hereinafter *Albertson's II*].

[202] *Albertson's I*, 38 F.3d at 1052.

[203] *Id.*

[204] *Id.*

deduction all interest paid or accrued within the taxable year on indebtedness."[205] The Commissioner argued that these amounts were deferred compensation.[206] The treatment of deferred compensation is very different from the treatment of interest under I.R.C. § 163. Instead of a deduction in the current taxable year, the payor of deferred compensation is not allowed a deduction until the recipients of the compensation include the compensation in their income.[207] In the Albertson's situation, the recipients would not include the compensation in their gross income until the end of the deferral period when it was actually paid to them.

The Ninth Circuit took diametrically opposed positions in its original hearing and its rehearing of the *Albertson's* case. In *Albertson's I*, the court focused on defining the word "interest" and then applied a literal language approach to I.R.C. §§ 163 and 404.[208] After determining that the amounts intended to compensate the recipients for the time value of money were interest,[209] the Ninth Circuit then looked at the literal language of I.R.C. § 404 to ascertain whether the delayed deduction requirement of that statute applied to interest.[210] From 1954 until 1986, I.R.C. § 404 delayed deductions allowed under I.R.C. §§ 162 and 212. In 1986, the section was amended so that it referred to "compensation."[211] Because I.R.C. § 404 did not specifically refer to interest, the Ninth Circuit allowed a current deduction for the interest component of the deferred compensation package.[212] The circuit panel noted that "we sympathize with the Commissioner's 'policy' arguments regard-

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[205] I.R.C. § 163(a) (1994).

[206] *Albertson's I*, 38 F.3d at 1053.

[207] I.R.C. §§ 83, 404 (1994).

[208] *Albertson's I*, 38 F.3d at 1053-56.

[209] *Id.* at 1054. The Commissioner had a fairly persuasive argument that these amounts should not be treated as interest. I will not discuss that issue and instead focus on the overall structural issues.

[210] *Id.* at 1054-56.

[211] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1851(b)(2)(C)(i), 100 Stat. 2085, 2863 (codified as amended at I.R.C. § 404(a) (1994)).

[212] *Albertson's I*, 38 F.3d at 1056.

ing Congress's intent."[213] It acknowledged that Congress, had it considered the problem may have preferred a different outcome, but "[e]ven if that is the case, however, Code changes are for Congress to make—not the courts."[214]

On rehearing, the same panel of the Ninth Circuit reversed its decision and abandoned the plain or literal language method of analysis in favor of a purpose approach.[215] The court found the "purpose" of I.R.C. § 404 by comparing "qualified" and "nonqualified" deferred compensation plans.[216] The important difference between types of deferred compensation plans is that under a "qualified" arrangement employers are allowed a current deduction for their contributions even though the employees are not required to include the income until it is actually received.[217] This mismatching of the timing of deduction and inclusion is not allowed in nonqualified plans.[218] Rather, there is a forced matching in that employers are not allowed a deduction until the employees include the amounts in their gross incomes.[219] As the Ninth Circuit points out, the tax code imposes few restrictions on nonqualified plans, but qualified plans are highly regulated and have fairly burdensome requirements to protect employees who are covered by the deferred compensation plan.[220] Therefore, if an employer wants the benefits that are available under a qualified plan arrangement (mismatching of income and deductions), it must satisfy the extensive regulations that the Code imposes on those plans. The purpose of the more favorable treatment of qualified plans, according to the Ninth Circuit, is to "create[]

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[213] *Id.*

[214] *Id.*

[215] *Albertson's II*, 42 F.3d at 545. "In the end we are forced, therefore, to reject Albertson's approach. We may not adopt a plain language interpretation of a statutory provision that directly undercuts the clear purpose of the statute." *Id.*

[216] *Id.* at 541-42. The court concluded that Congress's intent was to "ensure matching of income inclusion and deduction between employee and employer under nonqualified plans." *Id.* at 543.

[217] *Id.* at 541.

[218] *Id.* at 543.

[219] *Id.*

[220] *Albertson's II*, 42 F.3d at 541-42.

financial incentives for employers to contribute to qualified plans."[221] Allowing Albertson's to deduct the interest portion of its deferred compensation arrangement currently would "undermine the effectiveness of the timing restrictions by reducing the significance of the incentive structure created by section 404."[222] The ultimate conclusion of the Ninth Circuit on rehearing was that the amounts paid for the time value of the deferral were interest and that a literal reading of I.R.C. § 404 would allow a current deduction of those amounts.[223] The literal language, however, was rejected.[224]

Neither of the opinions the Ninth Circuit drafted are particularly well-reasoned or persuasive. The first decision was unnecessarily pinched in its analysis of the language of the statute, and the second opinion was needlessly broad. In *Albertson's I*, the court fell into the "plain language" trap of ripping statutory language from its context—both in content and time—and of looking for a precision of language that puts an unreasonable burden on Congress. *Albertson's II* suffers from the problems of over-reliance on ultimate purpose. Although the court is correct that Congress has provided incentives for employers to use qualified deferred compensation arrangements, that ultimate purpose fails to answer the specific question of how Congress would have wanted to treat the interest component of a nonqualified arrangement.

A conversational approach would have reached the same result as *Albertson's II* but would have rooted the analysis more directly in congressionally provided guidance. By focusing on the superficial plain or literal meaning while ignoring the structural clues in the Internal Revenue Code, the court overlooked a variety of congressional statements about how these compensation arrangements should be treated. These included historical context and dynamic statutory evolution that created

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[221] *Id.* at 543.

[222] *Id.* at 544. The court also noted that the interest payments will be a very large component of the amounts eventually paid to the recipients. *Id.*

[223] *Id.* at 545.

[224] *Id.*

a structure for both deferred compensation and accrued but unpaid interest.

Even assuming that the amounts Albertson's will pay for the time value of the deferral are within the literal definition of interest, this conclusion does not compel its current deduction. The Internal Revenue Code not only contains a forced matching scheme for nonqualified deferred compensation, it also includes a similar regime for interest. Unless a taxpayer falls within a de minimis exception, accrued but unpaid interest must either be included by the recipient who will eventually receive it or it cannot be deducted currently by the payor.[225] So for example, if Albertson's had actually paid these amounts and then borrowed them back on the same interest arrangements as contained in the deferred compensation contracts, the recipients would have to include the interest amounts currently in their income even though they will not actually receive the amounts until later. The taxpayer, therefore, is probably attempting to have its cake and eat it too. Albertson's, by denominating the amounts as interest, is arguing for a current deduction. At the same time, it is trying to reap the benefits of characterizing the amounts as deferred compensation to defer inclusion for its employees. By developing these two forced matching provisions, Congress set up a structure to prevent taxpayers from divorcing the timing of inclusion and deduction of compensation and interest. This structure demonstrates a congressional purpose to prevent exactly the type of mismatching that the taxpayer is attempting. This structural, implementive purpose is much more concretely rooted in the language of the statute than the purpose of encouraging qualified deferred compensation plans.

The Ninth Circuit should have weighed the benefits and disadvantages of a literal interpretation and a nonliteral approach based on structurally suggested purpose. The strengths of a nonliteral interpretation are upholding the congressionally

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[225] For example, the original issue discount provisions, I.R.C. §§ 1272-1275 (1994), identify the interest component of a variety of lending arrangements and require current income inclusion for accrued interest. The interest payor's deduction is matched to the payee's inclusion. I.R.C. § 163(e) (1994).

created statutory scheme and treating similar situations alike. Deferred compensation arrangements that do not specifically separate out a specified amount of interest still contain a time value of money component. In those situations, the court and the taxpayer both seem to agree that the deduction would be deferred under I.R.C. § 404. Therefore taxpayers in the same economic situation would be treated differently depending on the wording of their arrangement rather than its economic substance. The weakness is the decreased predictability caused by an interpretation that varies from literal language.

Important factors in the decision, therefore, are whether legitimate reliance interests are being upset and whether there is evidence that Congress intended the difference in treatment for economically similar compensation arrangements. This aspect of the structure of the code is apparent to a reasonably knowledgeable taxpayer. Certainly rule users that are attempting to utilize the "glitches" between the interest and deferred compensation rules are not being unfairly prejudiced by a court acknowledging those glitches. In addition, the "literal" interpretation given to I.R.C. § 404 in *Albertson's I*, which led the court to hold that Congress did not intend for the interest component of deferred compensation arrangements to be treated as compensation,[226] reads too much into Congress's choice of words. If Congress thought that the time value of money component of the deferred arrangement was also "compensation," then the choice of language that referred to "§ 162 and § 212 deductions" or to "compensation" was sufficiently broad to include the interest component. When I.R.C. § 404 was enacted, Congress had not yet begun to focus on the hidden interest components of contractual arrangements. Implicit interest in these arrangements, therefore, fell within the provisions of I.R.C. § 404 because there was simply no recognition that implicit interest differed in any way from the compensatory element. The reference to "§ 162 deductions" would have included the unstated interest component. The argument that Congress did not "intend[] section 404 to apply to interest deduc-

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[226] *Albertson's I*, 38 F.3d at 1054-56.

tions,"[227] therefore, rips the language Congress chose out of the context of the time when Congress adopted that language. The weakness of the argument that Congress intended a different treatment for the interest components of deferred compensation arrangements underscores the shortcomings of the "literal" language argument. The importance of the statutory scheme and the avoidance of interpretations that lead to arbitrary distinctions advocate the adoption of a nonliteral interpretation.

Adopting a nonliteral interpretation of statutory language because there is a conflict between the literal language and the ultimate purpose of a statute is more problematic. This type of interpretation, however, has a long history in United States judicial tradition. As early as 1892, the Court, in *Holy Trinity Church v. United States*,[228] limited the reach of the literal language of a statute to conform to the congressional purpose of the statute.[229] Treating a conflict between the language and the ultimate purpose of a statute as an ambiguity and allowing judges to choose a nonliteral interpretation has the potential for mistake and abuse. This ambiguity highlights the tension between rule of law concerns and the recognition that statutory purpose is also a congressional creation.

Congress often does not speak with complete clarity about the ultimate purpose of a statute. Even when the problem that sparked Congress to act is adequately discussed, the specific solution is not always clear. A statute may attempt to address multiple problems, and multiple solutions may be available for one or more of those problems. The language of a statute, therefore, may be a balance between several purposes. In addition, the ultimate purpose of a statute may be unclear because it is a response to competing goals. Congress, therefore, may be attempting to strike a compromise between goals that are not completely consistent. Exceptions that seem to undercut the

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[227] *Id.* at 1055.

[228] 143 U.S. 457 (1892).

[229] *Holy Trinity Church*, 143 U.S. at 472. In determining the legislative intent behind the statute, the Court considered "the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, [and] the reports of the committee of each house." *Id.* at 465.

ultimate purpose might be included to reach a compromise between supporters and opponents. The difficulty of assigning an ultimate purpose to a statute is a reason for courts to proceed cautiously in this area.[230]

The court also needs to evaluate whether it can fashion a better or more efficient solution than the one that would be reached by following the literal language of the statute. If, for example, the literal language of the statute conflicts with its ultimate purpose, but that purpose does not give sufficient guidance to determine how the statute should be interpreted to carry out the purpose, then the court should follow the literal language unless that language would significantly undercut the overall statutory purpose. In addition, if the literal language shows any indication of an intentionally carved out exception, the court should follow the literal language even if it conflicts with statutory purpose. Lastly, the court should consider whether the functioning of the literal language of the statute would give a reasonable reader notice that the language clashes with the statute's purpose.

With these considerations in mind, some choices between literal language and ultimate purpose are still fairly easy. For example, I.R.C. § 1221 defines the term "capital assets" as "property held by the taxpayer . . . but does not include" five categories of assets that are specifically listed.[231] Capital assets are treated differently from assets that generate "ordinary" gain or loss.[232] The ultimate purpose of differentiating between ordinary income property and capital assets is not clear, and there is significant dispute about exactly where one category of property ends and the other begins.[233] But it is clear

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[230] *See* Wald, *Sizzling Sleeper*, *supra* note 69, at 294. Evidence suggests that courts do exercise care in this area and rarely interpret a statute in a nonliteral manner based on the legislative purpose. *Id.*

[231] I.R.C. § 1221 (1994).

[232] *Id.* § 1. Certain long-term capital gains receive a preferential rate of tax. § 1. Alternatively, loss deductions generated by capital assets are subject to additional limitations and offset capital gains rather than income taxed at higher ordinary tax rates. I.R.C. § 1211 (1994).

[233] *See* Noel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319 (1993) (discussing possible purposes served

that the definition of "property" in I.R.C. § 1221 cannot include all property. If the literal language of I.R.C. § 1221 were followed, taxpayers could convert much of their ordinary income to capital gain merely by selling the right to the income before the payment was actually made. Without a nonliteral interpretation of "property," the right to a dividend payment could be sold before the payment was made and an item of ordinary income would be converted to capital gains. The distinction drawn by the I.R.C. § 1221 definition would be largely irrelevant.

In the case of I.R.C. § 1221, the courts are justified in adopting a nonliteral approach even though the ultimate purpose is not completely clear. Ignoring the conflict would eviscerate the purpose of the statute, so the damage done to the statutory scheme by rejecting a nonliteral interpretation is significant. In addition, the court can fashion a rule that substantially addresses the problem without excessive interference with the remainder of the statute. A nonliteral reading of the statute that payments received as mere substitutes for ordinary income are not "property" entitled to capital treatment[234] is limited to the area of conflict between the language and the purpose of the statute. Lastly, the problem created by a literal interpretation is evident from the statute. The relevant rule users (both taxpayers and the Internal Revenue Service), therefore, are not unreasonably surprised by the nonliteral interpretation.

The question of whether to adopt a nonliteral interpretation is more difficult when the conflict between the language of the statute and the purpose of the statute is less stark. Often this occurs when the language of the statute is overly broad for its purpose. In these cases the literal language does not undercut the purpose but instead overreaches. The courts in these

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by distinguishing between capital and ordinary income); *see also* Stanley Surrey, *Definitional Problems in Capital Gains Taxation*, 69 HARV. L. REV. 985 (1956) (discussing definitional difficulty presented by I.R.C. § 1221).

[234] For examples of cases taking this approach, see Commissioner v. P.G. Lake, Inc., 356 U.S. 260 (1958); Hort v. Commissioner, 313 U.S. 28 (1941); Rhodes' Estate v. Commissioner, 131 F.2d 50 (6th Cir. 1942).

situations are faced with the question of whether to follow the literal language of the statute and include rule users who were not intended to fall within its purview to be captured or to limit the language of the statute based on its purpose.

In deciding between a literal and a nonliteral interpretation, the court should evaluate whether the ultimate purpose is sufficiently clear to guide its interpretation. What has Congress said about the statute and what does its structure suggest? The court should also consider whether it can fashion an effective and workable nonliteral interpretation. The balancing of these concerns can be demonstrated by exploring two situations where the language of a statute arguably conflicts with its purpose.

The first example illustrates an overbreadth problem that the court is competent to solve. I.R.C. § 280A disallows a deduction for home offices except under certain situations that are specifically delineated in the statute.[235] The taxpayer in *Hamacher v. Commissioner*[236] was an independent contractor who was hired by a theater to perform in its plays and who also worked as an actor for other employers.[237] The taxpayer also was the administrator and a teacher in the theater's acting school.[238] The Commissioner conceded that the taxpayer had two separate and independent business activities—that of an independent contractor actor and also that of a salaried employee of the theater.[239] Hamacher used a room in his apartment exclusively for activities that related to his employment duties and to his independent acting work, and he deducted the expenses of maintaining the home office.[240] The Commissioner challenged the deduction because home office de-

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[235] I.R.C. § 280A (1994).

[236] 94 T.C. 348 (1990).

[237] *Hamacher*, 94 T.C. at 350. Hamacher was a professional actor who had worked in theaters, television and motion pictures. *Id.*

[238] *Id.* Hamacher's responsibilities at the school included teaching, directing the school's internal affairs and choosing the school's curriculum. *Id.*

[239] *Id.* at 354.

[240] *Id.* at 351. Hamacher used this home office to rehearse for independent work and to perform administrative duties for the acting school. *Id.* at 351-52.

ductions are allowed under I.R.C. § 280A only if the home office is "exclusively used on a regular basis—(A) as the principal place of business for any trade or business of the taxpayer. . . . In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer."[241] If the taxpayer had used the home office only for his work as an employee, he was not entitled to a deduction because the use was not for the convenience of his employer. If, however, Hamacher had used the office only for his work as an independent contractor, the home office would be deductible if it was the principal place of business for that work. The issue presented by the case, however, is whether the dual use of the office for both a trade or business activity that did satisfy I.R.C. § 280A and one that did not would prevent the home office deduction. The Tax Court held that even if Hamacher's use of the office for his independent contractor business would satisfy the I.R.C. § 280A requirements, his use of the office in connection with his employment was "personal use" and, therefore, the exclusive use requirement was violated.[242]

The Tax Court is correct that the literal language of the statute requires this outcome. The legislative history of the statute makes clear, however, that the concern was whether the space was used for personal purposes and whether there was sufficient need for office space at the taxpayer's home.[243] Denying a deduction to a taxpayer, who otherwise would have qualified for the home office deduction, because he performed too much trade or business activity in his home office reaches further than necessary to carry out the purpose for the statute. The language of the statute is overbroad.

After deciding the language reaches further than the purpose of the statute justifies, the court should consider whether it can cure the overbreadth problem without interfering with the remainder of the statute and whether predictability will be

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[241] I.R.C. § 280A(c)(1) (1994).

[242] *Hamacher*, 94 T.C. at 359.

[243] S. REP. NO. 94-938, at 147 (1976), *reprinted in* 1976-3 C.B. 49, 185.

undercut. A judicial decision that the "exclusive use" requirement in the statute refers to trade or business use and that once a qualifying use has been satisfied additional trade or business use will not be grounds for disallowing the deduction would be very effective. This interpretation would carry out the purpose of the statute, would cure the overbreadth of the language, and would not create any additional interpretational problems.

The predictability of this statute would only be decreased by a nonliteral interpretation if reasonable readers would consistently reach the same result as the court did when applying a literal language application.[244] If reasonable readers would question the result under the literal language, then the literal interpretation is not more predictable than another possible interpretation. The question posed, therefore, is whether a reasonable reader, when faced with Hamacher's facts, would read the language of the statute to mean that doing more trade or business work in his home office (but not using it for any personal use) would disallow his home office deduction. Although I do not have any empirical evidence on this point, I find it unlikely that reasonable rule users would automatically reach that result based on the language of the statute.[245] Instead, the most likely purpose of the statute, to prevent personal use and insure a certain level of business use, is strongly insinuated by the structure and language of the statute.[246]

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[244] Arguably a consistent literal interpretation would increase predictability because rule users would know that the literal interpretation would be followed. Courts, however, do not consistently follow a literal language interpretation in all circumstances. Neither should they, as this devalues Congress's role in lawmaking and increases inefficiencies that are not related to predictability. Therefore, the relevant question is whether in this circumstance reasonable rule users are more likely to predict an outcome based on a literal reading.

[245] Although this is not a scientific survey, my students consistently question whether the court's reading is the only possible reading or the best reading.

[246] The requirement that the office must be used "exclusively" for the listed purposes prohibits personal use. The listed uses "principal place of business" or "meeting with customers or clients" limit the deductions to situations where the need for the home office goes beyond merely that it is convenient for the taxpayer to work there. The legislative history supports this reading. *See* S. REP. NO. 94-938, at 148-49, *reprinted in* 1976-3 C.B. 49, 186-87. The Tax Court, however,

When that structural purpose is supported by legislative history, a taxpayer/rule user is justified in arguing for a nonliteral approach, and the Internal Revenue Service is not being treated unfairly by an interpretation of the statute based on its purpose.

A disagreement between the legislative history's description of purpose and the literal language of a statute should not always result in a nonliteral interpretation. If a nonliteral interpretation based on purpose would destroy the implementive purpose of the statute, the literal language should be followed unless there is an obvious drafting error. In that situation a reasonable rule user would assume that the legislative history is not a full description of the statute since the court could not follow the articulated purpose without effectively repealing the statute. For example, I.R.C. § 280G disallows a deduction for the payment of "golden parachutes" when a company is taken over.[247] Golden parachutes are employment contracts that are entered into with key employees that, if control of the corporation changes, the employee will receive certain payments. The legislative history describes golden parachutes as mechanisms by which corporate managers inappropriately ward off take-over attempts and states that the tax system should not subsidize the attempts of management to entrench themselves in their positions.[248] The legislative history clearly indicates a disapproval of the use of golden parachutes because these payments to current management in-

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decided that an activity that is clearly a trade or business activity (work as an employee) would be treated as "personal" activity merely because it was not one of the accepted listed uses. *Hamacher*, 94 T.C. at 359. The statute does not require that reading. Textualists who argue that the language actually used is the best indicator of congressional purpose would agree with the Tax Court's outcome. That level of exactitude in word usage assumes a drafting process that is exquisitely careful about word selection and the structure of word usage. This approach is merely judges reading more precision into language than can reasonably be expected.

[247] I.R.C. § 280G(a) (1994).

[248] STAFF OF THE JOINT COMM. ON TAXATION, 98TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 199-200 (Comm. Print 1984).

crease the "price" that the party attempting the take over must pay.[249] They must pay the shareholders for their stock, and they must also pay the key employees' golden parachute payments. At first blush the purpose of the statute and the literal language appear to mesh quite well. Congress disapproves of golden parachute payments, and so it penalizes them by disallowing a deduction. The problem becomes apparent, however, when the statute is applied. Golden parachute payments will only be made if there is a successful take over.[250] If the deduction for those payments is denied, the party that suffers the economic detriment is not the entrenched prior management, but the payors.[251] Those payors are, of course, the taxpayers who were successful in the take-over attempt, otherwise the golden parachute payments would not be made. This seems to run directly counter to the purpose in the legislative history.

Whether the court, in this instance, should assign a nonliteral interpretation to the statute is a more complicated question than in the home office situation. First, the court cannot assign a nonliteral interpretation that is consistent with the purpose expressed in the legislative history to the statute without doing extreme violence to its language. The entire implementive purpose of the statute, denying the deduction for the parachute payments, would be destroyed. Second, the ultimate purpose is less clear. Was the purpose to punish the recipients of the payments? Or was the purpose simply to remove the tax benefit of making the payment regardless of whether the "entrenched management" or the successful take-over company suffered the loss of the deduction? If the latter is the purpose, then the purpose and the literal language are not in conflict. Although the former purpose has more support in the legislative history, the fact that there is a possible alternative purpose and the difficulty of assigning a nonliteral interpretation that does not effectively repeal the statute should lead the

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[249] *Id.*

[250] I.R.C. § 280G(b)(2) (1994).

[251] *Id.* § 4999. The receipt of the golden parachute payment is also penalized by the imposition of a 20% excise tax on the recipient. § 4999.

court to follow the literal language of I.R.C. § 280G. In such situations, where legislative history is not definitive and where a nonliteral interpretation would effectively repeal a constitutionally enacted statute, the rule user's request for clarification should be directed toward Congress and not the courts.

In sum, conflicts between the literal language of a statute and its purpose pose a unique problem for courts. Unlike ambiguous statutes or conflicts between statutes where the court must look to external sources for guidance, in a conflict between language and purpose, the court must choose between following the literal language of the statute or adopting a nonliteral interpretation. The primary concerns of the court in this dilemma are, first, how clear is the conflict; second, how significant is the conflict; and, third, can the court design an effective remedy for the conflict. If the conflict is merely arguable or a nonliteral interpretation would cause more problems than it solves, then the court should follow the literal language of the statute. In those circumstances, the effective solution to the problem rests with Congress or with a regulatory agency.

This balance also assists rule users. If the conflict between the literal language and the purpose is clear, rule users will be faced with the difficulty of applying the statute to their situations. In those circumstances a rigid rule of law approach that limits rule users to the text will undercut predictability. Allowing the rule users to rely on congressional statements of purpose in legislative history and structure will provide them with additional guidance in determining meaning. Professor Spence has emphasized that the textualist approach of limiting the use of legislative histories undercuts rule users' ability and inclination to "voluntar[ily] compl[y] with statutory mandates and prohibitions."[252] Therefore, in situations where courts can fashion effective remedies to conflicts between language and purpose, they should exercise their discretion to do so.

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[252] Spence, *supra* note 64, at 611.

C. Changed Circumstances

Difficulty in the application of a statute because of changed circumstances is the most profoundly distressing for some commentators. Professors Redish and Chung have argued that allowing judges to consider changes in the social and legal landscape will dramatically impinge on Congress's authority to have its constitutionally enacted statutes respected.[253] They assert "[i]f an interpreter is authorized on virtually every occasion to decide that, in light of societal evolution, a constitutionally valid statute is no longer appropriate, no statute is safe from effective repeal."[254] Although defining the exact limits of the appropriate role of changed circumstances in statutory interpretation is challenging, a new or transformed context in which the statute must operate cannot be ignored. Rule users recognize that the new circumstances call the application of the statute into question. Courts must respond to those inquiries. In addition, a fuller analysis of the situations in which the problem of changed circumstances arises demonstrates that the difficulties anticipated by Redish and Chung are exaggerated. Acknowledging that judges must consider changing circumstances in their interpretation of statutes does not authorize them to replace Congress's policy judgments with their own.

The first step in examining the impact of changed circumstances on statutory interpretation is dividing changed circumstances into two classes. The first category consists of those situations where a new transaction or factual situation has arisen since the statute was enacted. The question presented in that circumstance is how the statute will apply to the new situation. The second category includes situations in which facts, assumptions, or circumstances that were in place at the time the statute was enacted have changed. The issue in those instances is whether the change in circumstances should have an impact on the way the statute is applied.

When new transactions or factual situations arise, recog-

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[253] Redish & Chung, *supra* note 19, at 845.

[254] *Id.*

nizing the newness of the transaction does not undercut Congress's authority. Rather, this situation resembles the state of affairs that exists when statutory language is indistinct. The court is merely acknowledging an interpretational problem that the rule users have identified and that Congress has not directly answered. How that problem is solved is what determines whether congressional primacy is being respected.

The courts could take an archeological approach by asking what the enacting Congress would have done had it considered this issue. The problem with the court attempting to put itself into the enacting Congress's shoes is that usually there will be little guidance about issues that Congress did not consider. Recreating the process that produced the original statute is impossible. In addition, because the analysis is susceptible to manipulation, it is also indeterminate.

Once the effort to reconstruct how the enacting legislature would have voted is rejected, the court must acknowledge its role as an independent decision maker. The court, however, is not completely without boundaries or guidance in making its determination. In its attempt to apply statutes to a new set of circumstances in a reasoned way, the court should focus primarily on which interpretation of the statute will treat similar situations alike[255] and on whether applying the statute in this manner fulfills or contradicts the purpose of the current statutory scheme.

Weighing how the interpretation of a statute conforms to current law ("horizontal fit") allows for controlled updating. Instead of focusing solely on how a particular interpretation conforms to historical clues about meaning ("vertical fit"), debating "the coherence of a present decision with other sources of law (other statutes, common law decisions)"[256] forces courts

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[255] A method that treats similar situations alike in attempting to reach a result produces two benefits. The first is arbitrary line drawing is reduced and equity increased. Second, rule users will have an enhanced ability to reason by analogy in predicting the outcome of a statute's application to their facts.

[256] Eskridge, *Public Values*, *supra* note 9, at 1013. Professor Eskridge noted that such an approach would depart from the traditional emphasis on historical coherence. *Id.*

to struggle with a changing legal landscape. While the court is not limited to the historical clues of a particular statute, neither is the court free to update the statute according to its vision of what the statute should say. The court is still tied to traditional sources of law—congressional enactments, agency regulations, and judicial precedent. A wider range of the dialogue between the government participants, however, is available for guidance.[257]

For example, the growth of tax shelters in the late 1960s through the early 1980s provided the Internal Revenue Service with a new challenge. "Tax shelter investments provided a significant portion of the investor's return in the form of tax benefits that not only offset any tax liability that might arise from the investment but also 'sheltered' other income, usually from the investor's regular business or professional activities."[258] Many of these transactions were structured solely to produce a certain tax treatment and were not profitable or economically viable in the absence of those tax benefits.[259] The I.R.S. challenged these transactions in a variety of ways, including an attempt to apply I.R.C. § 183.[260] This section was not designed to prevent tax sheltering, rather, its purpose when enacted was to distinguish between activities that were personal hobbies and those that were engaged in with the intent of making a profit.

Were the courts acting unreasonably and substituting their policy for that of Congress by allowing I.R.C. § 183 to be used to combat tax shelters? If the focus is narrowly drawn and restricted to the original purpose of that section, then the court is overstepping the bounds of the congressional directive. A better question for the court to ask, however, is how other transactions that share the characteristics of tax shelters are treated.

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[257] *See, e.g.,* Ford Motor Co. v. Commissioner, 102 T.C. 87, 98-99 (1994).

[258] PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION 919 (3d ed. 1994).

[259] *See, e.g.,* Dean v. Commissioner, 83 T.C. 56, 72-75 (1984) (discussing tax shelter that was structured solely to create deductions that would shelter other income).

[260] *See, e.g.,* Smith v. Commissioner, 937 F.2d 1089 (6th Cir. 1991); Karr v. Commissioner, 924 F.2d 1018 (11th Cir. 1991), *cert. denied,* 502 U.S. 1082 (1992).

Tax law has a long and rich history of refusing to respect transactions engaged in solely to generate a certain tax treatment. If a taxpayer engages in a sham transaction[261] or a transaction without a business purpose,[262] or enters into a transaction that cannot generate a pre-tax profit,[263] courts have consistently disallowed the tax benefits of those transactions. Even without the benefit of I.R.C. § 183, courts would be justified in refusing to respect tax shelter transactions as shams or lacking in economic substance.[264] The interpretation of I.R.C. § 183, therefore, does not take place in a vacuum. Rather, it fits into a pre-existing I.R.C.body of law that includes judicial precedent as well as statutory law.

In addition, interpreting I.R.C. § 183 to deny tax shelter deductions fits the policy of that section. Although the particular abuse that sparked its enactment was the deduction of personal hobby losses, the underlying reason that those deductions were problematic was that they were not generated in a profit-seeking activity. This reading of I.R.C. § 183 respects and upholds the policy preferences of Congress rather than displacing them. The end result is that when faced with a new type of transaction, tax shelters, the court was justified in looking at a broad range of sources of law and attempting to "fit" the treatment of this new transaction into that mix of rules in a way that treated it like similar transactions.

This focus on fitting new circumstances and transactions into the current statutory scheme is arguably the most democracy-respecting approach. If the statutory ambiguity were to be answered by the legislative branch, it would be the current Congress, not a long-disbanded one, that takes up the question.

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[261] *See, e.g.*, Knetsch v. United States, 364 U.S. 361 (1960); Waterman S.S. Corp. v. Commissioner, 430 F.2d 1185 (5th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971).

[262] *See, e.g.*, Helvering v. Gregory, 69 F.2d 809 (2d Cir. 1934).

[263] *See, e.g.*, Goldstein v. Commissioner, 364 F.2d 734 (2d Cir. 1966).

[264] *See, e.g.*, Rose v. Commissioner, 868 F.2d 851, 853 (6th Cir. 1989) (finding that taxpayers had no actual and honest profit objective in their venture and that transactions were "devoid of economic substance and merely a means to reduce tax liability").

Therefore, considering the current Congress's preferences is also the most efficient answer. Interpreting the statute in its application to the new circumstances in a way that fashions the best fit with the current statutory scheme minimizes the chance that the current Congress will act to overturn the court's decision. This brings the law back into equilibrium with the fewest pendulum swings.

Focusing on the horizontal fit of a statute also increases rule users ability to predict outcome. Rule users can look to the treatment of similar transactions under current law and either predict the treatment of their situation or, at least, narrow the range of possible outcomes. Current law is more accessible to rule users than trying to predict how the court would reconstruct the enacting Congress's answer to this specific question.

Interpretational problems caused by changes in circumstances that existed at the time the statute was enacted (rather than new transactions arising after the statute was enacted) present the court with two choices. Either the court can apply the literal language of the statute without considering the impact of the changed circumstances or the court could allow subsequent changes to influence its interpretation.

The "ignore the change" approach can be justified on the grounds that the literal language of the statute and its original purpose are in agreement, and, thus, the statute is not ambiguous and must be interpreted according to its literal language. This approach also has the benefit of simplicity. For example, the dissenters' position in *Bob Jones University v. United States*[265] has the advantage of simplicity. Bob Jones University was a nonprofit private school that had racially discriminatory policies.[266] The university sought status as an I.R.C. § 501(c)(3) organization, which would bring the school a variety of advantages—the most important of which was that donors to

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[265] 461 U.S. 574 (1983).

[266] *Bob Jones Univ.*, 461 U.S. at 580. Based on the theory that the Bible forbade interracial dating and marriage, the University excluded all black students until 1971 and refused to accept applications from unmarried blacks until 1975. *Id.* After 1975, black students were admitted, but interracial dating and marriage were prohibited. *Id.*

the school could deduct their donations as charitable contributions under I.R.C. § 170.[267] In order to qualify as an I.R.C. § 501(c)(3) organization, an entity must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."[268] The university argued that it was an educational organization, and therefore, it satisfied the literal requirements of the statute.[269] The dissent agreed with that position.[270]

The price of that simplicity, however, is high. It produces results that are so far outside what is currently acceptable that either Congress will be forced to respond or Congress will not respond and arbitrary results will be allowed to stand, increasing the incoherence of that body of law. For example, in the area of law dealing with racial discrimination, the provision of government subsidies to racially discriminatory organizations would be treated differently depending on whether the benefits were provided directly as cash grants or indirectly through the tax system. The majority in *Bob Jones University* found the cost of literal interpretation, without consideration of changing social mores, to be unacceptably steep. Instead of a literal interpretation that was mired in the expectations of the enacting Congress, Chief Justice Burger's opinion acknowledged changing attitudes and legal developments.[271] The majority denied Bob Jones University's request for tax-exempt status.[272] The Court interpreted I.R.C. § 501(c)(3) to require that tax exempt organizations must meet a common law definition of charitable in addition to the listed statutory requirements and held that racial discrimination was contrary to fundamental public poli-

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[267] I.R.C. § 170 (1994).

[268] *Id.* § 501(c)(3).

[269] *Bob Jones Univ.*, 461 U.S. at 585-86. The university relied on the use of the word "or" in the statute to support its interpretation of the exemption. *Id.* at 585.

[270] *Id.* at 612 (Rehnquist, J., dissenting).

[271] *Id.* at 592-96. Chief Justice Burger cited considerations of justice, individual rights and the policy of eliminating racial discrimination as factors in interpreting the statute. *Id.* at 592-95.

[272] *Id.* at 605.

cy.[273] Bob Jones University, therefore, could not meet the common law requirements of charitable organizations.[274] Although the Court reaches its result under a strained reading of the statute and its legislative history, the fundamental goal of the Court was clear. Even though racially discriminatory institutions were acceptable as privileged, tax-exempt organizations in the past, changes in the legal treatment of government-supported racial discrimination meant that granting tax-exempt status to these organizations was no longer tolerable.

In addition, the argument that interpreting I.R.C. the statute according to its literal language is more respectful of Congress is misleading. Interpreting I.R.C. § 501(c)(3) according to Congress's understanding at the time of its enactment devalues all the changes that Congress and constitutional interpretations have made since the statute was enacted. Enforcing the specific intent or understanding that the older Congress attached to I.R.C. § 501 is only superficially more respectful of Congress. By attempting to isolate the interpretation of I.R.C. § 501 from other changes, the dissent in *Bob Jones University* undervalues newer congressional statements about racial discrimination. Such a method of interpreting statutes undercuts congressional authority by compartmentalizing the law in a way that minimizes Congress's voice in the conversation that develops and defines a body of law.

The difficulty presented by the *Bob Jones University* case demonstrates that situations involving changed circumstance can be further divided into two categories—first, situations where the legal landscape changes after the enactment of a statute, and second, situations where factual assumptions or attitudes have changed. The first category is the same as a conflict between statutes. There is a conflict between different congressional statements or between a congressional statement and a judicial ruling on a constitutional issue. Allowing judges to exercise their discretion to decide cases in this situation does not give them free reign to substitute their own judgments any

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[273] *Id.* at 592-96.

[274] *Bob Jones Univ.*, 461 U.S. at 587-88.

more than allowing them to settle conflicts between statutes.

Predictability for rule users or for Congress is not unfairly undermined by allowing changes in the legal landscape to influence judges statutory interpretation. As a practical matter, mainly older statutes will be overcome by changes in the surrounding areas of law. In addition, the change in the legal landscape already would have undercut and called into question the original understanding of the statute. Neither rule users nor Congress, therefore, had a reasonable reliance interest in the original understanding of the statute. The *Bob Jones University* example demonstrates this. Between the time I.R.C. § 501 was enacted and 1983, when *Bob Jones University* was decided, the law governing racial discrimination had undergone an enormous change. Rule users, therefore, could easily have predicted that government benefits flowing to racially discriminatory organizations were open to challenge.

The last category of changed circumstances seems to present the most difficult interpretive problem. What if factual or social changes have occurred that undercut the assumptions on which the original understanding of the statute was based. Rather than being tied to anything even remotely acted upon by Congress, these changes are completely divorced from the legislative process. Using these changes in assigning statutory meaning appears to allow judges to exercise unbridled discretion to limit or expand a constitutionally enacted statute with a settled and determinate meaning based on language and original purpose.

This description of using changed factual or social circumstances, however, is too limited to capture the full import of the changes. A judge's interpretation should be influenced by these changes not merely because the circumstances have changed. Rather, a decision maker focuses on these changes because they relate to the purpose of the statute. The measuring stick of when changes are sufficiently dramatic to be worthy of note, therefore, is provided by Congress. Do the changes undercut the goal that Congress was attempting to reach? If a literal language interpretation, in light of the new circumstances, does conflict with the congressional purpose of the statute, then that

interpretation is not truly more respectful of Congress's role than an interpretation that carries out Congress's purpose. In addition, this approach instructs judges to look to Congress's actual direction rather than to their own predilections of good policy.

When evaluated in this light, the inquiry about changed facts is essentially the same evaluation undertaken anytime there is a conflict between language and purpose. The only difference is that the conflict arose after the statute was enacted. The timing does not make the conflict any more difficult to evaluate, and the same concerns should govern the outcome. The court should question the clarity of the purpose and whether it can fashion an effective remedy.

Changed factual circumstances that undercut the original assumptions of the statute do not raise additional concerns about predictability. Generally, far from being surprised by the change in circumstances, rule users often will be the ones identifying the difficulty because they must apply the law to the new circumstances. For example, Professor Sunstein has advocated a nonliteral interpretation of the Delaney clause that "prohibits the sale of food additives that 'induce cancer when ingested by man or animal' or are found 'after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man and animal.'"[275] He argued that advances in research and technology had undercut the ability of the Delaney clause to carry out its purpose.[276] Assume that Professor Sunstein was correct in identifying the "purpose" of the Delaney clause as safety of the food supply. Assume also that the enacting Congress specifically intended that no de minimis exceptions were allowed and that the state of technology at the time meant that these assumptions were not in conflict. Therefore, a judge applying the statute near the time of enactment of the statute would have rejected a nonliteral interpretation that allowed de minimis exceptions.

If technological advances undercut the assumptions on

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[275] Sunstein, *supra* note 9, at 496 (citing 21 U.S.C. § 348(c)(3)(A) (1982)).
[276] *Id.*

which the statute was based, are either Congress or rule users harmed by a change in interpretation? Assume again, for the sake of argument, that Professor Sunstein is correct that changes in the ability to identify weak carcinogens, in conjunction with an interpretation of the Delaney clause that does not allow a de minimis exception, is actually making the food supply less safe. Redish and Chung argue that allowing judges to engage in nonliteral interpretation in those circumstances dramatically undercuts the primacy of Congress by effectively allowing judges to repeal Congress's statutes and policy choices.[277] They assert that "[a] judge could conceivably conclude that no one could have foreseen the enormous loss of jobs and inflationary pressure caused by environmental restrictions adopted by Congress in the 1960s and 1970s and, therefore, choose to ignore those statutes."[278]

Commentators' fears of effective repeal by judges who disagree with congressional policy judgments are overstated. First, they ignore the checks and safeguards built into the judicial system. An idiosyncratic court will have its decisions overturned by higher courts. The opinions of the Supreme Court are widely reported and likely to come to Congress's attention. Thus, opinions not subject to judicial reversal are the opinions that are most likely to receive a response from the public and Congress. Second, these commentators seem to assume either that judges will engage in a standardless review or that they will act in bad faith to undercut Congress's will. The latter problem cannot be addressed by any statutory interpretation method. A result-oriented judge who is willing to ignore congressional direction cannot be restrained by methodology. Reversal of his or her decisions is the only corrective action that is effective. Assuming that judges are acting in good faith, however, the use of changed circumstances in judicial interpretation will not leave them free to undercut congressional policy choices, because it is exactly those policies that provide the standard for determining when the changed circumstances

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[277] Redish & Chung, *supra* note 19, at 845.
[278] *Id.*

should have an impact on the interpretation of the statute. The Delaney clause should not be reinterpreted to contain a de minimis exception merely because technology allows more carcinogens to be identified; it should be reinterpreted because those changes undercut the congressional purpose of safe food supplies. Similarly, the example about inflationary pressures and environmental protection laws would not justify a judicial re-interpretation of the statute. The loss of jobs, while perhaps unexpected, does not undercut the statutory purpose of environmental protection. If that policy arguably "costs" too much in job displacement, then adjusting that balance between jobs and environmental protection is quintessentially Congress's policy call.

Far from being disrespectful of its choices, the attempt to interpret statutes according to Congress's stated purposes values the policy choices made by the legislature. Just as rigid literal interpretation in the face of a concurrent conflict between language and purpose elevates the form of deference to Congress over its substance, so does ignoring later changes that undercut the purpose of the statute. If courts do not consider changing circumstances, then adjusting to those changes would require that Congress revisit every statute on a regular and continuing basis. This imposes a hugely inefficient, if not impossible, burden on legislative resources.

The problems faced by rule users in situations of changed factual circumstances are the same as those which they confront when language and purpose conflict at the time of enactment. Rule users, such as the Food and Drug Administration in the Delaney case, will be aware of the problem because they are in the posture of attempting to comply with a statute that seems contradictory. These rule users are requesting judicial interpretation because they already find the application of the statute unclear. This method of updating also indirectly protects the interest of rule users who are not involved in the current controversy. Because of the posture of these disputes about statutory meaning, the new interpretation will be asserted by one rule user and contested by another. This allows the judge to evaluate whether the asserted changes are sufficient

to create a conflict between language and purpose.

In sum, directly addressing changed circumstances is more respectful of Congress's appropriate role, more responsive to the needs of rule users, and more realistic in describing the courts' task. Ignoring that changed factual circumstances have undercut Congress's purpose for enacting a statute or refusing to consider that Congress has made later statements that have an impact on earlier ones discounts Congress's voice in shaping current law. Refusing to address the uncertainty caused by changing circumstances also poorly serves rule users' needs and fails to acknowledge their legitimate request for a resolution of the conflict. A method of statutory interpretation that enables judges to consider changed circumstances does grant judges greater discretion in the decision-making process. It also requires that courts make judgments that may call on their own values. This is an inescapable element of judicial decision making. The relevant question, however, is whether the risk of judges inappropriately imposing their policy preferences is greater in the context of changed circumstances. Because judges are governed by the same standards here as in other statutory ambiguities, the risk is no higher. In addition, the cost of imposing mechanical rules that deny changing circumstances is too high. First, some changed circumstances are simply too compelling to ignore. An interpretative methodology that ignores this merely creates disingenuous opinions. Second, basing decisions on all the relevant evidence about the meaning of the statute will create a more coherent body of law, thus increasing both equality of treatment and predictability for rule users.

IV. Conclusion

Regardless of the method of interpretation selected, judges engage in law-making activities. The substantive results reached in each judicial decision unavoidably adds to and shapes the existing body of law. The pressing question is not whether judges will fill a law-making role; short of refusing to decide the cases that come before them, they have no choice. The important question, therefore, is how the judiciary should exercise its authority.

My conversational model offers a method of statutory interpretation that accommodates and values input from all the parties who are interested in the determination of what a statute means. By identifying sources of meaning that respect its legislative role, Congress is granted the respect due it under Article I. By acknowledging that the task of judging is a difficult one, this model allows the judiciary to speak openly about its decision-making process. Instead of fending off criticism for not fulfilling the impossible role of congressional agent, the courts can explore openly a full range of congressional, judicial, and regulatory statements in the attempt to assign rational and coherent meaning to ambiguous statutes.

Lastly and most importantly, a conversational model explicitly recognizes that rule users have legitimate concerns that the rule makers should consider. Focusing on the needs of rule users gives courts an organizing principle around which to shape their analysis of statutory ambiguity. Rather than functioning in an acontextual vacuum of statutory language or attempting to unearth Congress's unarticulated intent, a court puts themselves in the position of the rule user in evaluating the evidence that is available about the meaning of ambiguous statutes. In short, this model recognizes that there are no perfect or easy answers. Rather, it attempts to balance the voices of all of the appropriate participants in the debate about statutory interpretation.

REESTABLISHMENT OF RELIGIOUS FREEDOM: DEVELOPING AN ALTERNATIVE MODEL BASED ON STATE CONSTITUTIONALISM PRIVACY

Daniel Gordon[*]

I. INTRODUCTION: DUELING CLAUSES AND INDIVIDUALISM

Two clauses of the same constitutional provision protecting one type of human behavior should not clash with each other. Both clauses should be interpreted as being in harmony, otherwise, the protections of one clause could cancel the protections of the other. In the 1990s, the Establishment Clause appears to conflict with the Free Exercise Clause of the United States Constitution.[1] The Establishment Clause restricts the free exercise of religion in political and governmental contexts, weakening religious presence in American society,[2] while the Free Exercise Clause threatens to destroy

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[1] U.S. CONST. amend. I. In a recent case involving the clash between the Free Exercise Clause and the Establishment Clause, a district court held that the Establishment Clause prevented a student-led, morning devotional over a school's intercom system. Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582, 588 (N.D. Miss. 1996).

[2] *See* Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 267-68 (1992) (discussing Establishment Clause and its effect on religion); Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 196-200 (1993) (commenting on effect of adhering to Establishment Clause); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 494 (1991) (stating that Supreme Court has stripped government of all power to support religion); Robert T. Jackson, Jr., Comment, *A Call To Secure Religious Exercise Under The Mississippi Constitution*, 62 MISS. L.J. 133, 136-41 (1992) (discussing recent cases re-

the separation of state and religion, threatening religious liberty and diversity.[3] Such a clash seems odd when both clauses protect religious observance from governmental interference.[4] A war between these religious freedom clauses could easily result in less religious freedom.

A war between the Free Exercise Clause and the Establishment Clause creates temptations for the federal courts to decrease the protection accorded religious freedom. Logically, three resolutions to the war exist. First, the Establishment Clause could dominate, allowing little or no government involvement with religion, thereby relegating religious practice and principles to an inferior level in American society.[5] On the other hand, the Free Exercise Clause could dominate, entangling government and law with religion, thereby allowing the majority or larger religious sects to control public policy and legal enforcement to the detriment of smaller and minority religions.[6] Last, the federal courts could decide to allow neither clause to dominate. Instead, the courts could

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stricting free exercise of religion).

[3] *See* William P. Marshall, *Is the Constitutional Concern with Religious Involvement in the Public Square Hostility?*, 42 DEPAUL L. REV. 305, 310 (1992) (stating that First Amendment recognizes good and bad qualities of religion); William P. Marshall, *The Inequality of Anti-establishment*, 1993 BYU L. REV. 63, 68-71 (1993) (recognizing threat to religious freedom); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 854 (1993) (noting danger of introducing religion into public matters); Sheldon H. Nahmod, *The Public Square and the Jew as Religious Other*, 44 HASTINGS L.J. 865, 868-69 (1993) (commenting that government ought not promote religious ideas into marketplace of ideas); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1089-92 (1990) (examining what should be done when religious beliefs clash with rational interpretation of law).

[4] Everson v. Board of Educ., 330 U.S. 1, 18 (1947). The *Everson* court upheld a New Jersey statute which allowed public funds to be used for transportation of public and parochial school children. *Everson*, 330 U.S. at 17. *But see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating compulsory pledge of allegiance in classroom).

[5] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 105-115 (1993). Carter states that "[t]he separation of church and state is one of the great gifts that American political philosophy has presented to the world. . . . " *Id.* at 107.

[6] Nahmod, *supra* note 3, at 868. The unfettered involvement of religion in public life could be a "powerfully destructive political force." Marshall, *The Other Side of Religion*, *supra* note 3, at 859.

narrow the scope and application of both clauses to decrease the conflicts between them.[7] Narrowing the scope and application of both clauses would weaken the protections offered by both, allowing deference to statutes that negatively impact religious practice and freedom of religious practice.[8] All three judicial applications of the Free Exercise and Establishment Clauses would weaken religious freedom in some form. Preferring the Establishment Clause threatens the positive impact of all religion in American society. Preferring the Free Exercise Clause threatens the dozens of smaller sects in America,[9] undermining their impact on American society. Weakening both clauses allows government greater opportunities to impact religion negatively.

Currently, religious freedom seems to suffer in America. The United States Supreme Court has decided some cases in accord with the third alternative, thus weakening the Free Exercise and Establishment Clauses. In *Employment Division v. Smith*,[10] the Supreme Court permitted the State of Oregon to deny unemployment benefits to former employees fired from a job for utilizing peyote for sacramental and ceremonial purposes.[11] Not only did the Court fail to protect a religious ceremony from negative and restrictive state action, but it also lowered the level of protection for the free exercise of religion by restricting the use of the compelling state interest test in

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[7] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting). Rehnquist noted that there was intended a greater degree of flexibility when "legislating consistently the Free Exercise Clause." *Thomas*, 450 U.S. at 727 (Rehnquist, J., dissenting).

[8] Glendon & Yanes, *supra* note 2, at 518-34. A narrowing of both clauses would deprive "small, unconventional, or unpopular religions" of rights and freedoms previously guaranteed. *Id.* at 530-31.

[9] BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD, RELIGION IN CONTEMPORARY SOCIETY 115-17 (1993). The largest religious group in America is the Catholic church. *Id.* at 115. Various other smaller groups exist, such as Jews and Muslims. *Id.*

[10] 494 U.S. 872 (1990).

[11] *Smith*, 494 U.S. at 890. The Court noted that the Free Exercise Clause does not mean that an individual, on religious grounds, may violate a "valid and neutral law of general applicability." *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

the context of free exercise cases.[12] Overall, *Smith* weakened for the foreseeable future Free Exercise protection under the Constitution.[13]

The Establishment Clause has fared little better. For instance, in 1995, the Supreme Court found that Ohio could permit private entities to display unattended crosses on the state house plaza.[14] The Court also required the University of Virginia to fund a student organization that published a Christian newspaper.[15] Both cases expanded the presence of religion on public property and in public programs even when public funds are expended.

The war between the Establishment and Free Exercise Clauses will destroy religious freedom in the United States. Alternative models of protecting religious freedom suggest a means for ending the war between them. Alternative models exist in the state constitutions which include a variety of provisions dealing with the relationship between the states and religion and religious beliefs and behaviors.[16] Specifically, in

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[12] *Id.* at 882-90. The Court previously refused to apply the *Sherbert* test in a variety of contexts. *Id.* at 883-84.

[13] Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 BYU L. REV. 259, 260 (1993). The *Smith* decision is both "substantively wrong and institutionally irresponsible." *Id.*

[14] Capitol Square Review & Advisory Bd. v. Pinette, ___ U.S. ___, 115 S. Ct. 2440 (1995). The *Capitol Square* Court determined that the display was religious expression which deserved the same protection as private, secular expression. *Capitol Square*, 115 S. Ct. at 2446.

[15] Rosenberger v. Rector of Univ. of Va., ___ U.S. ___, 115 S. Ct. 2510 (1995). The *Rosenberger* Court noted that regulations burdening expression because of the content of that expression violate the Free Exercise Clause. *Rosenberger*, 115 S. Ct. at 2516.

[16] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 276 (1993) (urging courts to reject *Smith*); Mechthild Fritz, *Religion in a Federal System: Diversity Versus Uniformity*, 38 U. KAN. L. REV. 39, 40 (1989) (discussing impact of federalism on religious rights); James C. Harrington, *Free Speech, Press, and Assembly Liberties Under the Texas Bill of Rights*, 68 TEX. L. REV. 1435, 1445-46 (1990) (noting state's affirmative grant of religious freedom); Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 51-81 (1992) (discussing recent decisions in state courts recognizing greater, lesser and different protections under state constitutions); Jeffrey S. Portnoy, *The* Lum *Court and the First Amendment*, 14 U. HAW. L. REV. 395, 396-

the 1980s and 1990s, Florida has applied its state constitution to protect the freedom of Jehovah's Witnesses and others to practice their religion.[17] The Florida cases provide a conceptually different model from the current decision making of the United States Supreme Court in the area of religious freedom. Florida's development of religious liberty is particularly intriguing because many of the words of its state constitutional provision that protects religious freedom are similar to the words of the First Amendment of the United States Constitution.[18]

This article reviews the fifty-year development of the war between the Free Exercise Clause and the Establishment

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400 (1992) (discussing state case decisions considering federal decisions); Michael P. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion Under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91, 98-110 (1989) (specifically addressing freedom of religion under Illinois Constitution); Meryl Skidman, *State Constitutional Law: 1992*, 24 RUTGERS L.J. 1133, 1138-41 (1993) (reviewing cases concerning New Jersey's state protections for religious freedom); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 95-106 (1989) (surveying interpretations of state constitutional religious guarantees); John M. VanDyke et al., *Protection of Individual Rights Under Hawaii's Constitution*, 14 U. HAW. L. REV. 311, 369-72 (1992) (discussing state theory); Alexander Wohl, *New Life for Old Liberties-The Massachusetts Declaration of Rights: A State Constitutional Law Case Study*, 25 NEW ENG. L. REV. 177, 182-86 (1990) (discussing religious guarantees contained in Massachusetts Declaration of Rights); L.S.W., Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 631-53 (1985) (discussing state court interpretation of state establishment clauses in school aid context).

[17] M.N. v. Southern Baptist Hosp. of Fla., Inc., 648 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 1994). The *M.N.* court, for example, held that it was a fact question whether the state could override parent's refusal on religious grounds to allow blood transfusions for their leukemia-stricken child. *M.N.*, 648 So. 2d at 771; *see In re* Dubreuil, 629 So. 2d 819, 828 (Fla. 1993) (holding hospital impermissibly allowed husband to contradict wife's refusal, on religious grounds, of medical treatment); Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (upholding parent's right to refuse children's medical treatment); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668-69 (Fla. Dist. Ct. App. 1985) (upholding patient's right to refuse blood transfusion).

[18] FLA. CONST. art. I., § 3. The provision states, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . . No revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious determination . . . ." *Id.*

Clause. It describes and analyzes how the state of Florida has protected religious freedom for Jehovah's Witnesses during the past decade. Florida law which protects the freedom of Jehovah's Witnesses to practice their religion suggests some theoretical alternatives to the constitutional war between the Free Exercise and Establishment Clauses, and this article develops those theoretical suggestions.

II. From Tension Between the Clauses to War Between the Clauses

The tension created for state governments by the Free Exercise and Establishment Clauses appeared in *Everson v. Board of Education*[19] when the United States Supreme Court with the aid of the Fourteenth Amendment applied the Establishment Clause to the states.[20] In *Everson*, a New Jersey statute authorized school districts to provide for the transportation of children to and from schools. One school district allowed reimbursement to parents for bus transportation of children when the children utilized public transportation to and from school, including the transportation of children to and from Catholic schools.[21] The *Everson* Court recognized that New Jersey faced a paradox, and that paradox reflected the tension between the Establishment and Free Exercise Clauses.[22]

On one hand, the Establishment Clause forbade New Jersey from spending tax monies on institutions which propagated religious tenets and faith.[23] Yet, the Free Exercise Clause forbade New Jersey from withholding public funding

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[19] 330 U.S. 1 (1947).

[20] *Everson*, 330 U.S. at 5-8. The First Amendment is applicable to the states through the Fourteenth Amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

[21] *Id.* at 3. The church schools gave their students religious instruction and the superintendent of the schools was a Catholic priest. *Id.*

[22] *Id.* The court noted that government may not aid one or all religions, or prefer one over another. *Id.*

[23] *Id.* at 16. The court commented that government may also not participate in religious activities or vice versa. *Id.*

from people because they were religious,[24] thus, New Jersey could not withhold general state benefits for religious reasons nor utilize public benefits to discourage religious practice.[25] The *Everson* Court resolved the issue by creating a fine balance between state support for religion and state discouragement of religion. The balance tipped against public programming when the state spent its money directly on specific religious programs.[26] The Court allowed the reimbursement by finding that New Jersey avoided spending money directly on specific religious programs and that the transportation payment program provided a general service to all parents irrespective of religious beliefs.[27]

Two years after *Everson*, the Supreme Court developed a more comprehensive means of resolving the tension created by the Establishment and Free Exercise Clauses. In *Illinios ex rel. McCollum v. Board of Education*,[28] the Court turned away from the fine balance between free exercise and establishment developed in *Everson*, implicitly developing instead a narrow free exercise exclusion zone. In *McCollum*, an Illinois school district permitted religious groups to substitute religious education for secular education during regular school hours.[29] The Supreme Court found that the school district utilized tax supported public property for the dissemination of religious doctrines and delivered students to religious organizations for proselytizing,[30] state behavior which violated the Establishment Clause.[31] However, the *McCollum* Court failed

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[24] *Id.*

[25] *Everson*, 330 U.S. at 16. The court worried that overreaching the Establishment Clause would infringe upon the right of the citizens of New Jersey to exercise their religion. *Id.*

[26] *Id.* at 18. The *Everson* court recognized that all children received the benefit regardless of their religious persuasion or lack thereof. *Id.*

[27] *Id.* Therefore, the law did not prefer one religion over another or prefer religion over the secular. *Id.* at 15.

[28] 333 U.S. 203 (1948).

[29] *McCollum*, 333 U.S. at 205. The groups taught one thirty-minute class per week. *Id.*

[30] *Id.* at 212. The court rejected the notion that forbidding a religion to indoctrinate captive students was overtly hostile to religion. *Id.* at 211.

[31] *Id.* at 212. The court explicitly noted that the practice should be struck

to recognize a countervailing free exercise threat similar to the one that had faced the school district in *Everson*.

The *McCollum* court recognized a sphere of governmental operations where free exercise failed to apply to the actions of government actors.[32] The sphere, the free exercise exclusion zone, included the actions of public school administrators who controlled and expended public funds and regulated student behavior.[33] When expending government monies and regulating student behavior such as class attendance, school administrators avoided facing free exercise problems. The *McCollum* court never even implied that school administrators could stop students from privately following religious dictates or that students possessed no free exercise rights on school property.[34] The *McCollum* court only created a sphere of exclusion in which school administrators could escape a free exercise conflict if they avoided all involvement with religion and the propagation of religious beliefs.

During the 1960s, the limited free exercise exclusion zone created by the *McCollum* court continued to resolve a smoldering conflict between the religious freedom clauses. The free exercise exclusion zone[35] included action by government officials which amounted to religious observance, such as prescribing the form of prayer,[36] allowing the machinery of gov-

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down lest the "wall between church and state" would crumble. *Id.*

[32] *Id.* The Court noted that to rule otherwise would violate the tradition of separation manifested in the First Amendment. *Id.* at 211-12.

[33] *Id.* at 210-12. Since *Everson*, the Court has consistently upheld the First Amendment as prohibiting entanglement with religion. *Id.* at 210-11.

[34] *Mccollum*, 333 U.S. at 203-12. The Court never addressed the issue. *Id. But see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (upholding Jehovah Witness' right to refuse to salute and pledge allegiance to American flag).

[35] *See* John T. Valauri, *The Concept of Neutrality In Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 145 (1978). Valauri notes that another author established two zones of doubt, stating, "For the free exercise clause, . . . all that is 'arguably religious' should be considered religious. . . . For the establishment clause . . . anything 'arguably non-religious' should not be considered religious." *Id.* (quoting LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978)).

[36] Engel v. Vitale, 370 U.S. 421, 429-31 (1962). The *Engel* court prohibited schools from forcing its students to recite the official "state prayer." *Engel*, 370

ernment to support religious beliefs when those beliefs reflected the beliefs of the majority,[37] or to prefer one belief system over others, such as preferring people who celebrated the Sabbath on any given day.[38] The Free Exercise Clause was not implicated when specific government officials took actions that directly involved religious observance. Hence, the free exercise exclusion zone remained a narrow one involving only government officials acting in their official capacity.

While operating in the free exercise exclusion zone, government officials acted with what the Supreme Court characterized as "wholesome neutrality" when faced with religious beliefs and practices.[39] The only legitimate governmental objectives remained secular ones,[40] and the neutrality of the free exercise exclusion zone supported free exercise. When public officials remained restricted in exercising their own religious beliefs or facilitating the exercise of religious beliefs of the citizenry, even a majority, the rights of all individuals to practice their religion remained protected. Private individuals, including public officials outside of their capacities as public officials, could practice their faith without interference from public officials. In fact, neutrality created a point where the Free Exercise and Establishment Clauses overlapped. Both clauses mandated that government stay neutral when

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U.S. at 424.

[37] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963). The *Schempp* court stated that neutrality was the most advantageous policy for the state to ensure that religion maintain its proper role in society. *Schempp*, 374 U.S. at 226.

[38] Sherbert v. Verner, 374 U.S. 398, 409 (1963). In *Sherbert*, the court held that a state action revoking a claimant's right to unemployment benefits because she would not work on her religion's sabbath violated her constitutional right to the free exercise of her religion. *Sherbert*, 374 U.S. at 403-06.

[39] *Schempp*, 374 U.S. at 222-23. This neutrality adequately insures that the Establishment Clause and the Free Exercise Clause, which overlap, are both respected. *Id.*; *see Sherbert*, 374 U.S. at 409-10 (stating that balancing free exercise rights of citizen against Establishment Clause requires neutrality).

[40] *Schempp*, 374 U.S. at 222. "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.*; *see Sherbert*, 374 U.S. at 408 (stating statute must have secular purpose).

dealing with the religious.[41] Neutrality meant that state officials avoided doing anything religious[42] and preferring a religion[43] or a religious practice over others.[44]

The *McCollum* free exercise exclusion zone appeared to resolve tensions between the Free Exercise and Establishment Clauses in the early 1960s. However, the Supreme Court hinted that it remained uncomfortable about the tension recognized in *Everson*.[45] The Court implied that tension may exist just below the surface of the free exercise exclusion zone. For instance, the Supreme Court denied that the Court showed hostility toward religion and prayer when the Court disallowed prayer in a public setting such as a public school classroom.[46] The Court continued to evidence its defensiveness when it also denied that it created the establishment and state endorsement of religious observance requiring that a state government respect religious observance.[47] Further, the Supreme Court defended itself against charges that it created the establishment of a "religion of secularism" by restricting religious exercises in public programs carried out on public property.[48]

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[41] *Schempp*, 374 U.S. at 222. However, one primary distinction between the two clauses is that a violation of the Free Exercise Clause is based on coercion while the Establishment Clause has no such requirement. *Id.* at 223.

[42] *Id.* at 226. The basis for this limitation was to quiet "well justified" fears arising from prior governments' acts of imposing a specific religion on men. *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

[43] *Sherbert*, 374 U.S. at 409-10. The Supreme Court held that South Carolina may not apply unemployment eligibility provisions that require a worker to abandon his religious beliefs respecting the day of rest. *Id.* These actions by the Supreme Court reflect the governmental obligation of neutrality. *Id.*

[44] *Engel*, 370 U.S. at 436. Although the practice in this case was a brief and general prayer, it was held unconstitutional because it would set precedent that would allow greater harms in the future. *Id.*

[45] *See supra* notes 22-25 and accompanying text.

[46] *Engel*, 370 U.S. at 433-34. The Court noted that the history of man showed that governmental neutrality was necessary to protect this freedom of religion. *Id.* at 434-35.

[47] *Sherbert*, 374 U.S. at 409. The Court held that it was not fostering the establishment of religion by extending unemployment benefits. *Id.*

[48] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963). The Court cited a need for comparative study of religion as an alternative to this notion of "secu-

By 1971, the free exercise exclusion zone began to collapse under the resurfacing tension between free exercise and establishment, though it had served to resolve the conflict between the First Amendment clauses for over twenty years. The Supreme Court hinted in the early 1960s at a sense of discomfort arising from not squarely facing the conflict.[49] By 1971, the discomfort transformed into the recognition of a problem. The Supreme Court conceded that "[s]ome relationship between government and religious organizations is inevitable."[50] Total separation was impossible, and any wall of separation between government and religion became "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[51] Services neutrally provided to all entities could also be provided to churches. The Supreme Court backed away from a clear cut zone or area of human behavior where religion could not be practiced. Instead, it recognized that sometimes religion and government benefit from each other. The Supreme Court reconnected with the balance that the *Everson* court created in 1947 between the Establishment and Free Exercise Clauses.[52] The Supreme Court implied that once again it feared that too much separation between government and religion could result in a disincentive to religious practice just as the *Everson* Court had recognized in 1947. A free exercise exclusion zone that was too

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larism." *Id.*

[49] *See supra* notes 35-43 and accompanying text.

[50] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The Court cited fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws as necessary contacts between church and state. *Lemon*, 403 U.S. at 614.

[51] *Lemon*, 403 U.S. at 614. When determining if the governmental involvement is "excessive," the Court "must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

[52] Everson v. Board of Educ., 330 U.S. 1, 16-17 (1947). When protecting the citizens of New Jersey against state establishment of churches, the Court made certain that it did not "inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson*, 330 U.S. at 16.

tight, well defined, and well protected could lead to less religion and religious freedom.

The 1980s evidenced further erosion of the free exercise exclusion zone and the emergence of the modern war between the Free Exercise and Establishment Clauses. In *Widmar v. Vincent*,[53] the United States Supreme Court invaded the free exercise exclusion zone in its review of a religious group's[54] challenge to a University of Missouri regulation that prohibited the use of university facilities for religious worship and teaching.[55] The Supreme Court held that when a public entity created a forum generally open to all comers, the public entity could not enforce a content-based exclusion of religious speech.[56] The *Widmar* Court allowed religious expression including prayer[57] on the very narrow public programmatic territory that had constituted the free exercise exclusion zone.[58] Public officials, the core of the free exercise exclusion zone,[59] could benefit religious expression by providing access to public facilities.[60] However, the *Widmar* court implicitly conceived of the new encroachment by religious expression on public programmatic territory as marginal.

The Court allowed religious groups to utilize public facilities on equal bases with non-religious groups, but it found that the public officials and public entities involved in providing facilities to religious groups avoided endorsing the religious messages and behavior of those groups.[61] Also, the

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[53] 454 U.S. 263 (1981).

[54] *Widmar*, 454 U.S. at 265 n.2. This twenty-member group, Cornerstone, was an "organization of evangelical Christian students from various denominational backgrounds." *Id.*

[55] *Id.* at 266. The regulation made an exception for chapels; however, the Court noted that the closest chapel was at a campus 125 miles away. *Id.* at 265 n.3.

[56] *Id.* at 277. The Court found that the school's policy infringed upon the fundamental principle that state regulations must be content-neutral. *Id.*

[57] *Id.* at 265 n.2. The Court allowed Cornerstone to continue its meetings in classrooms and the student center. *Id.*

[58] *See supra* notes 52-56 and accompanying text.

[59] *See supra* notes 38-43 and accompanying text.

[60] *Widmar*, 454 U.S. at 273-74. The Court noted that "incidental" benefit does not violate the prohibition against the primary advancement of religion. *Id.*

[61] *Id.* at 274 n.14. The Court recognized that University students are less

Court acknowledged that public entities could continue to control their core services, excluding religious expression from those services. In *Widmar*, the core services constituted teaching and education.[62] The Court conceded that public universities possessed the authority to allocate resources and to determine what may be taught and by whom.[63] Religious expression could still be kept by public universities out of classrooms and teaching contexts. *Widmar* left the free exercise exclusion zone in tenuous existence at best. Minimally, the Supreme Court limited the extent of the zone. Free exercise existed on the non-core periphery of public programs such as facilities open to all university students. However, the core programs, such as the university classroom, remained implicitly within the remnants of a shrinking free exercise exclusion zone. The shrinking of the zone favored the emergence of the modern war between the Free Exercise and Establishment Clauses.

Widmar signalled that the free exercise of religion belonged in a public program such as a state university system. In *Widmar*, the tension between free exercise and disestablishment already evident as early as *Everson v. Board of Education*[64] in 1947 escalated into an outright battle between the clauses. In *Widmar*, the student religious group challenged the Missouri religious worship and teaching restrictions on free exercise, equal protection, and free speech bases.[65] The State of Missouri based its regulation squarely on disestablishment grounds, and based its case on a compelling state interest in maintaining the strict separation of church and state.[66]

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impressionable than younger students and would understand the University's policy of neutrality. *Id.*

[62] *Id.* at 267 n.5. The Court recognized that a university campus is a public forum for its students. *Id.*

[63] *Id.* at 276. The Court expressly stated that the University has the power to establish, "reasonable time, place and manner regulations." *Id.*

[64] 330 U.S. 1, 16-17 (1947).

[65] *Widmar*, 454 U.S. at 266. These claims were brought under the First and Fourteenth Amendments to the Constitution of the United States. *Id.*

[66] *Id.* at 270. The state derived this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions. *Id.*

Even though the parties in *Widmar* defined for the Court the direct conflict between disestablishment and free exercise, the Supreme Court backed away from the conflict and war between the clauses. The *Widmar* Court stated that "[t]he question is not whether the creation of a religious forum would violate the Establishment Clause."[67] Instead, the issue in *Widmar* revolved around regulating access to public facilities on the basis of speech content.[68] The Court avoided inquiring into the extent to which free exercise was infringed by the University of Missouri regulation.[69] Hence, the Supreme Court in *Widmar* drastically eroded the free exercise exclusion zone escalating the tension between free exercise and disestablishment toward war. At the same time, the Court held back. It avoided totally destroying the free exercise exclusion zone and acknowledging explicitly the war between the religious freedom clauses.

During the 1980s and early 1990s, the Supreme Court perpetuated the weakened and crumbling free exercise exclusion zone while the war between disestablishment and free exercise escalated. The free exercise exclusion zone shrank even further when the Supreme Court allowed state legislatures to hire chaplains to offer prayers at legislative sessions;[70] local governments to display nativity scenes[71] and menorahs;[72] the federal government to fund church affiliated

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[67] *Id.* at 273. The Court noted that the essence of the controversy lay elsewhere. *Id.*

[68] *Id.* Addressed this way, the Court was unconvinced that allowing all forms of discourse would primarily advance religion. *Id.*

[69] *Id.* at 273 n.13. This issue was avoided because other University groups had access to the University forum. *Id.* While recognizing that conflicts would arise between the First Amendment Clauses, the Court refused to address the resolution of such conflicts. *Id.*

[70] Marsh v. Chambers, 463 U.S. 783, 794-95 (1983). The Court reasoned that because prayers at legislative sessions had been carried out for over 200 years, allowing it to continue posed little threat to the Constitution. *Marsh*, 463 U.S. at 795.

[71] McCreary v. Stone, 739 F.2d 716, 726 (2d Cir., 1984) *aff'd sub nom.* Board of Trustees v. McCreary, 471 U.S. 83 (1985) (per curiam). The Second Circuit noted that governmental action that provides remote benefits does not necessarily violate the Establishment Clause. *McCreary*, 739 F.2d at 726.

[72] Allegheny County v. ACLU, 492 U.S. 573, 613 (1989). The Supreme Court

counseling centers;[73] public schools to provide facilities to community religious groups;[74] public schools to open access to extra-curricular, religious activities;[75] and public universities to pay for student sponsored religious activities.[76] At the same time, the Supreme Court retained free exercise exclusion remnants when it stopped a state from requiring the teaching of creationism,[77] a state from authorizing voluntary, student lead prayers in classrooms;[78] a state from requiring a moment of silence in public schools;[79] a public school from allowing clergy to offer prayers at graduation ceremonies;[80] and a state from creating a school district using the boundary lines of a religious enclave.[81]

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allowed the menorah to be displayed because it had both secular and religious dimensions. *Allegheny County*, 492 U.S. at 613-14.

[73] Bowen v. Kendrick, 487 U.S. 589, 622 (1988). The Supreme Court reversed the district court decision and ordered it to consider whether AFLA grants had the "primary effect" of advancing religion. *Bowen*, 487 U.S. at 622.

[74] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993). The Supreme Court found that allowing religious groups to use the school did not violate the Constitution because the use "would not have been during school hours, would not have been sponsored by the school, and would have been open to the public." *Lamb's Chapel*, 508 U.S. at 395.

[75] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 247 (1990). The Supreme Court held the school's denial of a meeting place because the applicant was a religious group to be an "equal access" violation. *Mergens*, 496 U.S. at 247.

[76] Rosenberger v. Rector of Univ. of Va., ___ U.S. ___, 115 S. Ct. 2510, 2524-25 (1995). The Supreme Court held acts of the University, such as refusing to fund the printing of the students' religious newspaper, to violate the First Amendment's Free Speech Clause that was not excused by the Establishment Clause. *Rosenberger*, 115 S. Ct. at 2525.

[77] Edwards v. Aguillard, 482 U.S. 578, 594 (1987). The Supreme Court held the act to be in violation of the Establishment Clause because its primary purpose was to further a particular religious belief. *Edwards*, 482 U.S. at 594.

[78] Karen B. v. Treen, 653 F.2d 897, 900 (5th Cir. 1981), *aff'd* 455 U.S. 913 (1982). The court found that the proposed act did not have a secular legislative purpose and thus violated the Establishment Clause. *Karen B.*, 653 F.2d at 900.

[79] Wallace v. Jaffree, 472 U.S. 38, 61 (1985). The Court held the act, which was intended to convey a message of state approval of prayer activities in public schools, to be a violation of the Establishment Clause. *Wallace*, 472 U.S. at 61.

[80] Lee v. Weisman, 505 U.S. 577, 599 (1992). The Court found the practice that compelled graduates who objected to participation violated the Establishment Clause. *Lee*, 505 U.S. at 599.

[81] Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, ___ U.S. ___,

The Supreme Court perpetuated the feeble existence of a weak core public program such as the public classroom where free exercise remained excluded. Around that weakened core, religious expression invaded space which bordered the core such as the school facilities. Even core public programs potentially could be converted into the margins of a public program when space emptied of one group, a class of students, and filled with another group, students involved in extracurricular activities.[82] The free exercise exclusion zone became an uncertain concept. The contours of the zone became questionable, at best. Such uncertainty invited a deepening and broadening of the war between disestablishment and free exercise, because a core public program easily could be converted into the margins of a public program allowing religious expression. Eventually, the public school classroom and other weakened core public programs would become the all out war zone for the establishment and Free Exercise Clauses.

The progressive weakening in the 1980s of the free exercise exclusion zone led to full scale war between the Free Exercise and Establishment Clauses in the 1990s. The war zone now centers on the core of public programming, especially the public school classroom. The war enlists widespread popular support, which the free exercise exclusion zone precluded in the period between the late 1940s and 1970s. A seemingly strong, neutral, religion free zone failed to invite popularly supported strife. In Establishment Clause cases during the late 1940s through the 1970s, the support for religious expression came from political leaders such as legislators who mandated bible reading,[83] bureaucrats, such as a

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114 S. Ct. 2481, 2494 (1994). A statute that created a school district based on boundary lines was found to violate the test of neutrality. *Grumet*, 114 S. Ct. at 2494.

[82] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 249-52 (1990). The Supreme Court rejected the argument that the school's recognized, student activities were an integral part of its educational mission. *Mergens*, 496 U.S. at 252.

[83] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963). In *Schempp*, a student was required to listen to bible reading each day before class unless excused by written request from his or her parent. *Schempp*, 374 U.S. at 205.

State Board of Regents, who wrote a mandated school prayer,[84] and community leaders who coordinated religious programs in public schools.[85]

In the 1990s, a recent Mississippi case provides an example of the new populist militancy. In *Ingebretsen v. Jackson Public School District*,[86] an overwhelming majority of the student body of a Jackson, Mississippi public high school requested that the principal permit the student body president to deliver a prayer over the school public address system. The principal acceded to the majority will of the student body and allowed the prayer[87] even though the school district attorney advised the principal otherwise.[88] The school district suspended the principal for a lack of professional judgment.[89] The suspension led to a 1960s style protest[90] where students in Jackson schools walked out of classrooms and faced suspensions.[91] Public rallies supporting the principal and school prayer ensued.[92] Finally, the Mississippi Legislature enacted a law protecting the rights of students to initiate voluntary, non-proselytizing prayers at school programs.[93] Unlike the

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[84] Engel v. Vitale, 370 U.S. 421, 422-23 (1962). State officials published the prayer as part of their "statement on moral and spiritual training in the schools." *Engel*, 370 U.S. at 422-23.

[85] Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 207 (1948). In *McCollum*, students attended religious classes pursuant to their parents request. *McCollum*, 333 U.S. at 207.

[86] 864 F. Supp. 1473 (S.D. Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996).

[87] *Ingebretsen*, 846 F. Supp. at 1478.

[88] *Id.* at 1478 n.7. The district attorney advised the principal that the action violated the constitution. *Id.*

[89] Board of Trustees v. Knox, 638 So. 2d 1278, 1280 (Miss. 1994). Upon review of the suspension, the Mississippi Supreme Court found no proof that the principal's return to work would harm the public interest. *Knox*, 638 So. 2d at 1283.

[90] THEODORE H. WHITE, THE MAKING OF THE PRESIDENT—1968-70 (1969).

[91] *Ingebretsen*, 864 F. Supp. at 1479. Two hundred ninety-nine students were suspended for actions made in protest to the principal's suspension. *Id.*

[92] *Id.* One of the largest rallies was conducted at the state capitol with Governor Fordice delivering a supportive speech. *Id.*

[93] 1994 Miss. Laws. Ch. 609 (1994) (codified at MISS. CODE ANN. § 37-13-4.1 (1972)). The legislature stated its interest as guaranteeing the free exercise rights of students at public schools. *Id.*

cases during the 1940s to 1970s,[94] the political and community leadership followed a popular movement supporting public prayers in Mississippi. *Ingebretsen* evinces a desire by many Americans to express their religiosity in the core of public programming, such as bible distribution on public school grounds,[95] prayer during graduation,[96] allowing oral reports on religion in a seventh grade public school classroom,[97] public funding for sectarian radio broadcasting,[98] and a religious exhibition by a group of police officers at a police headquarters.[99]

The weapons in the modern war between free exercise and establishment include civil rights advocacy and a moral critique of modern American Society. *Ingebretsen* provides an example of the civil rights advocacy evolving from the war for free exercise.[100] Essentially, the students' individual rights of freedom of expression were impaired.[101] By restricting reli-

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[94] *See supra* notes 19-51 and accompanying text.

[95] Schanou v. Lancaster County Sch. Dist. No. 160, 863 F. Supp. 1048, 1056-59 (D. Neb. 1994). The district court refused to find the public school's practice of allowing bible distribution to be a violation of the Establishment Clause. *Schanou*, 863 F. Supp. at 1059.

[96] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 458 (9th Cir. 1994). The Ninth Circuit held that prayer at high school graduation violated the Establishment Clause. *Harris*, 41 F.3d at 458.

[97] *See Religious Liberty: Hearing before the United States Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) [hereinafter *Senate Hearings*] (statement of Colleen K. Pinyan, Rutherford Institute) (relaying instances of religious discussions in classrooms) (on file with the *Mississippi Law Journal*).

[98] *See Senate Hearings, supra* note 97 (testimony of Ralph M. Jennings, WFUV-FM, Fordham University) (discussing Fordham's religious affiliations).

[99] *See Religious Liberty & the Bill of Rights, 1995: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 476, 479-80 (1995) [hereinafter *House Hearings*] (testimony of Joseph P. Infranco) (discussing desire of police officers to erect display to inform others about their Christian organization).

[100] Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994); *see also* Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (holding school prayer practices which require students to participate or conspicuously abstain violated Establishment Clause).

[101] 140 CONG. REC. S3870 (daily ed. March 25, 1994) (statement of Sen. Coats). Senator Coats expressed support of a bill that would deny federal education funds to any state agency that prevented constitutionally protected prayer. *Id.*

gious expression in public programming, governmental authority tells adults and children how and when to pray. Government becomes antagonistic to religion.[102] Government policy penalizes religious speech and behavior creating hostility and discrimination against religion.[103] Religious discrimination makes religious people, even when in the majority, feel like a minority because a form of official isolation occurs.[104] The new religious civil rights movement becomes complimented by a moral critique of modern America that condemns a lack of public expression of religious values and fervor. Those in favor of a free exercise exclusion zone allegedly want to drive God out of public programming.[105] The modern decay of American Society allegedly follows from the lack of God in all public programs[106]. Drugs and crime supposedly will never be stemmed without the regeneration of morality and spirituality[107], and prayers, especially in the school setting, supposedly will create the environment for social regeneration in America.[108]

The war between the Establishment Clause and Free Exercise Clause in the 1990s includes moral fervor and civil rights justice on the side of free exercise. In 1995, the United States Supreme Court implicitly revealed some weak signs of siding with the forces in favor of free exercise. In *Capitol Square Review & Advisory Board v. Pinette*[109], the Court held that government property could be utilized for private expression of religious belief where the property served as a

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[102] 140 CONG. REC. S3873 (daily ed. March 25, 1994) (statement of Sen. Coats). "People want to drive God completely out of the public . . . schools . . . ." *Id.*

[103] *House Hearings*, *supra* note 99, at 476-77, 481.

[104] *House Hearings*, *supra* note 99, at 331-36 (testimony of Jennifer Green).

[105] 140 Cong. Rec. S3873 (daily ed. March 25, 1994) (statement of Sen. Coats).

[106] *House Hearings, supra* note 99, at 459-63 (testimony of Mayer Schiller).

[107] 140 Cong. Rec. S 3440 (daily ed. March 22, 1994) (statement of Sen. Helms). Senator Helms stressed the importance of a "moral and spiritual footing" for the country.

[108] 140 Cong. Rec. S3439-40 (daily ed. March 22, 1994) (statement of Sen. Thurmond). Senator Thurmond expressed confidence that school prayer "will considerably add to the well-being and character development of America's children." *Id.* S3440.

[109] ____ U.S. ____, 115 S. Ct. 2440 (1995).

"traditional or designated public forum open . . . to all on equal terms."[110] In *Capitol Square*, the Klu Klux Klan petitioned to place a Christian cross on state property in front of the Ohio State House[111]. Reflective of the current war between the Establishment and Free Exercise Clauses, *Capitol Square* juxtaposed Ohio's claim that a cross on state house grounds violated the Establishment Clause with the Klu Klux Klan's right to free religious expression[112].

The Supreme Court implicitly acknowledged the new religious populism that has converted religious expression and religiosity into a civil right[113]. The Court reacted strongly to the idea that religious expression could be anything other than fully protected expression. Private prayers possessed greater constitutional free speech protection than pornography and at least as much protection as expletives.[114] The Court found that religious expression possessed preferential constitutional protection in the free speech[115] and free exercise[116] provisions of the First Amendment. Private citizens could demand that open and accessible public property, even at the center of government such as a state house square, afford an opportunity for religiosity.[117] The citizenry could convert a public domain equally open to all as a neutral center of demo-

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[110] *Capitol Square*, 115 S. Ct. at 2450. The Court found the plaza surrounding the statehouse satisfied the requirements of a traditional, designated public forum. *Id.*

[111] *Id.* at 2445. An advisory board denied the Klan's request for a permit on the ground that issuing it would violate the Establishment Clause. *Id.*

[112] *Id.* at 2445-46. The advisory board had previously allowed a Christmas tree, as well as a menorah during Chanukah, to be displayed on the grounds. *Id.*

[113] *See supra* notes 69-111 and accompanying text.

[114] *Capitol Square*, 115 S. Ct. at 2449. The Court recoiled at the idea that pornography and expletives should receive greater First Amendment protection than private prayers. *Id.*

[115] *Id.* at 2446. The Court pointed out that private religious speech "is as fully protected under the Free Speech Clause as secular private expression." *Id.* (citations omitted).

[116] *Id.* at 2449. The Court reiterated that the Free Exercise Clause has never been interpreted to be "an impediment to purely *private* religious speech." *Id.*

[117] *Id.* at 2448. The Court stated that the government's neutral treatment of private religion was not unconstitutional. *Id.*

cratic authority into a religious war zone where religious symbols clashed.[118]

Capitol Square tentatively and implicitly suggested a resolution of the war between the Establishment and Free Exercise Clauses. Free exercise would dominate even at the core of government programming, space, symbolism, and the seat of state government. A question remained unanswered by *Capitol Square* and the modern rhetoric in favor of free exercise and against disestablishment. That question involves whether religious freedom is furthered in the United States when free exercise dominates over disestablishment. If the religiosity of some, many, or all citizens becomes welcome in the core of programming, will religious minorities be threatened? Such questions may not be answerable until the current war between the religion clauses is resolved and the impact of the resolution is measured. Before the United States Supreme Court and the American polity decide how to resolve the modern religious rights war, one alternative analysis suggested by a state supreme court in applying its state constitution should be considered.

III. Resolving the War Between The Federal Religious Clauses: A State Constitutional Suggestion

One peaceful resolution of the war between the Free Exercise and Establishment Clauses can primarily be found in four Florida cases which suggest an alternative to the creation and destruction of the free exercise exclusion zone that has evolved over the past fifty years. These cases evince the mutual interrelation of free exercise and establishment, illustrating that the civic health of religious belief depends on the two being analytically linked. Moreover, these cases, involving religious practice that defies modern secular practices, demonstrate the value of applying free exercise and establishment in a coordi-

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[118] *Id.* at 2461 (Souter, J., concurring). After the board denied the permit, it granted "blanket permission" for all churches to erect crosses in protest of the Klan's proposed action, which several did, resulting in part of the square being covered with crosses. *Id.*

nated fashion, on an issue by issue basis, instead of defining a more comprehensive analytical model like a free exercise exclusion zone.

Religious opposition to blood transfusions created the context for the four Florida cases. Those who refuse medical treatment, especially Jehovah's Witnesses, test the bounds of religious freedom, challenging the United States Supreme Court to define religious liberty in both Free Exercise and Establishment Clause contexts.[119] The religious doctrines of the Jehovah's Witnesses place members of the sect in direct opposition to the government and common practices of the health profession. Jehovah's Witness adherents consider governments, and by implication, their legal system output, as evil.[120] Early in the history of the sect, the federal government clashed with the Jehovah's Witnesses.[121] The Jehovah's Witnesses not only possess a longstanding record of challenging governmental practices in a number of states,[122] but also possess such a record in Florida.[123] The sect also challenges

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[119] William Shephard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 997-1004 (1987). The Jehovah's Witnesses have no political agenda but have simply encountered governmental opposition while attempting to live according to their religious beliefs and, in doing so, have forced the court to reassess constitutional standards. *Id.* at 1001.

[120] Julie A. Koehne, *Witnesses on Trial: Judicial Intrusion Upon the Practices of Jehovah's Witness Parents*, 21 FLA. ST. U. L. REV. 205, 207-08 (1993). Jehovah's Witnesses believe that all governments are under the control of Satan and that patriotism is divisive. *Id.*

[121] ANTHONY A. HOEKEMA, JEHOVAH'S WITNESSES 14-16 (1963).

[122] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding state could not compel Jehovah's Witness to salute American flag); Jones v. City of Opelika, 316 U.S. 584, 598-99 (1942) (upholding book sale license requirement as applied to Jehovah's Witness); Cantwell v. Connecticut, 310 U.S. 296, 308-11 (1940) (reversing breach of peace convictions for proselytizing). "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Cantwell*, 310 U.S. at 303. *But see* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (holding state could compel students to salute American flag).

[123] *See, e.g.*, Hord v. City of Fort Myers, 13 So. 2d 809, 810 (Fla. 1943) (holding unconstitutional ordinance requiring permits as applied to Jehovah's Witnesses selling magazines on streets); State *ex rel.* Singleton v. Woodruff, 13 So. 2d 704, 706-07 (Fla. 1943) (holding license tax unconstitutional as applied to Jehovah's

modern medical practices by requiring members to refrain from ingesting blood, including that acquired through the medical practice of blood transfusion.[124]

In *St. Mary's Hospital v. Ramsey*,[125] a twenty-seven year old renal dialysis patient required blood transfusions to assure the success of dialysis, without which the patient faced death, possibly within hours.[126] The patient refused blood transfusions in adherence to the tenets of the Jehovah's Witnesses.[127] The Florida District Court of Appeals held that the patient could refuse blood transfusions even where his death leave a minor child fatherless.[128]

Public Health Trust v. Wons[129] involved circumstances similar to those in *Ramsey*. In *Wons*, a mother of two minor children who suffered from dysfunctional uterine bleeding faced the probability of death without a blood transfusion.[130] As a Jehovah's Witness, the patient declined the blood transfusions as violations of her religious principles.[131] Like the court in *Ramsey*, the *Wons* court found in favor of the patient even though her children could be left motherless by her decision.[132]

Witnesses selling religious materials); State *ex rel* Bleich v. Board of Pub. Instruction, 190 So. 815, 816-17 (Fla. 1939) (ruling county school board could compel students to salute flag).

[124] *See* Koehne, *supra* note 120, at 207. Jehovah's Witnesses believe a blood transfusion is contrary to the Bible's prohibition against "eating blood." *Id.*

[125] 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

[126] *Ramsey*, 465 So. 2d at 667. The patient's life expectancy would likely have been normal if he had received the transfusion. *Id.* at 667-68.

[127] *Id.* at 668. The court stated that the patient's "deeply held faith teaches that ingestion of whole blood will deny him both resurrection and eternal salvation." *Id.*

[128] *Id.* at 668-69. The court held that this right was subject to four limitations: preservation of life, protection of third parties, prevention of suicide and medical ethics. *Id.*

[129] 541 So. 2d 96 (Fla. 1989).

[130] *Wons*, 541 So. 2d at 97. The court noted that the decision required balancing troublesome individual and state interests. *Id.*

[131] *Id.* The patient's husband testified that he fully supported his wife's decision to refuse treatment. *Id.*

[132] *Id.* at 97-98. Parental responsibilities do not override fundamental constitutional rights. *Id.*

In re Dubreuil[133] mirrored *Wons*. In *In re Dubreuil*, a mother of four gave birth by Caesarean section, experiencing a significant loss of blood due to a condition that prevented proper blood clotting.[134] The patient refused to consent to a blood transfusion because she adhered to the religious convictions of the Jehovah's Witnesses, thereby facing an extreme medical emergency although a transfusion could save her life.[135] Even in the throes of such an emergency and the probability of depriving four children of their mother,[136] the Florida Supreme Court held that the patient possessed the right to refuse medical treatment.[137]

The religious affiliation of the patient in *M.N. v. Southern Baptist Hospital of Florida, Inc.*[138] remained unstated in the Florida District Court of Appeals' opinion. The patient in *M.N.* was an eight month old baby suffering from "acute monocytic leukemia, severe anemia, and a low platelet count."[139] The parents of the child refused to consent to the blood transfusions necessary for chemotherapy because of their religious beliefs.[140] Even in the case of a minor, the *M.N.* court found that the parents' right to make fundamental decisions concerning the health of their child might outweigh other considerations, depending on the gravity of the situation.[141] The

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[133] 629 So. 2d 819 (Fla. 1993).

[134] *In re Dubreuil*, 629 So. 2d at 821. Although Dubreuil consented to the Caesarean section by signing a standard release, she refused to consent to blood transfusions. *Id.* at 820.

[135] *Id.* at 821. The patient's estranged husband, not a Jehovah's Witness, consented to treatment, and a quantity of blood was transfused into the patient before the hospital petitioned the circuit court to determine its authority regarding further transfusions. *Id.*

[136] *Id.* The patient had children aged twelve, six, four, and a newborn. *Id.*

[137] *Id.* at 827. The court found that the state did not show an interest sufficient to outweigh the patient's constitutional right. *Id.*

[138] 648 So. 2d 769 (Fla. Dist. Ct. App. 1994).

[139] *M.N.*, 648 So. 2d at 770.

[140] *Id.* at 770. The parents also expressed concern that the treatment would cause the child undue suffering. *Id.*

[141] *Id.* at 771. The court stated that the state's interest in the preservation of life "diminishes as the severity of the affliction and the likelihood of death increase." *Id.*

M.N. court remanded the case to the trial court for a weighing of all the interests concerning the parents and the child.[142]

Ramsey, Wons, Dubreuil, and *M.N.* shared common bases of legal doctrine and analysis. All four cases involved Florida's state interests in privacy and religious freedom. Three of the cases referred directly to the rights of privacy and religious freedom[143] while only one implicated religious freedom and privacy.[144] The *Ramsey* court based its analysis of the right to refuse blood transfusions on the constitutional right to privacy.[145] The *Ramsey* court never specified whether that right derived from the Florida or federal constitution, though it referred to *Satz v. Perlmutter*,[146] a case based on the federal constitutional right to privacy and the common law right to privacy.[147] The *Wons* court based its analysis on the rights of privacy and religious freedom,[148] though like the *Ramsey* court, the *Wons* Court failed to specify explicitly whether the court based its thinking on federal or state constitutional law. However, the special concurring opinion in *Wons* by the chief justice of the Florida Supreme Court specifically identified the

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[142] *Id.* at 771-72. The court listed the interests as: parental rights, preservation of life, child's best interests, likelihood of effective treatment, treatment's effect on the child, and survival rate without treatment. *Id.* at 771.

[143] *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); Public Health Trust v. Wons, 541 So. 2d 96, 97 (Fla. 1989); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668-69 (Fla. Dist. Ct. App. 1985).

[144] M.N. v. Southern Baptist Hosp. of Fla., Inc., 648 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 1994). The *M.N.* court, however, never dealt directly with both interests of religious freedom and privacy. *M.N.*, 648 So. 2d at 770-71. It spoke instead of the "fundamental liberty interest in the parent-child relationship." *Id.* at 771.

[145] *Ramsey*, 465 So. 2d at 668. The court held that a competent patient has the right to refuse medical treatment for whatever reason, including those reasons not related to religion. *Id.* It noted, however, that the patient's religious convictions made his plight more compelling. *Id.*

[146] 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980). The court allowed the removal of artificial live-saving devices per the patient's and the patient's family's wishes. *Satz*, 362 So. 2d at 164.

[147] *Satz*, 362 So. 2d at 161. The *Satz* court relied on Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977), which was decided using a blend of federal constitutional privacy law and tort law. *Satz*, 362 So. 2d at 161.

[148] Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989).

Florida constitutional right to privacy[149] as the basis for privacy rights in Florida and identified the free exercise of religion without specifying whether he meant the state constitutional or federal constitutional protection.[150] Finally, the *In re Dubreuil* court explicitly identified the Florida constitutional rights of free exercise of religion[151] and privacy[152] as providing the basis for the court's analysis. In *M.N.*, the court reverted to vagueness about the bases for religious freedom and privacy in Florida, though it referred to more than one case based on the Florida constitutional right to privacy.[153] Though the earliest cases possessed ambiguous analytical underpinnings, the Florida Supreme Court made it clear by the 1990s that the rights to privacy and religious freedom are protected by the Florida Constitution,[154] and *Wons, In re Dubreuil, M.N.*, and *Ramsey* reflect the recognition of such religious rights.

The Florida Constitution explicitly protects religious freedom and privacy. Religious freedom remains guaranteed by a number of different provisions. Unlike the United States Constitution, where religious freedom becomes protected in one amendment that includes more than just protection for religious freedom,[155] the Florida Constitution protects religious

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[149] FLA. CONST. art. I, § 23 (amended 1980).

[150] *Wons*, 541 So. 2d at 102 (Ehrlich, C.J., concurring). The court noted that the state provided stronger protection of privacy than the United Sates Constitution, but simply elaborated on a "right to free exercise in religion." *Id.* (Ehrlich, C.J., concurring).

[151] FLA. CONST. art. I, § 3.

[152] FLA. CONST. art. I, § 23 (amended 1980).

[153] M.N. v. Southern Baptist Hosp., Inc., 648 So. 2d 769, 771 (Fla. Dist. Ct. App. 1994) (citing *In re* Guardianship of Browning, 568 So. 2d 4, 7 (Fla. 1990) (holding surrogate may exercise constitutional right of privacy for one who has become incompetent)); *In re* Dubreuil, 629 So. 2d 819, 828 (Fla. 1993) (holding constitutional right of privacy allows patient to refuse medical treatment).

[154] *See In re Dubreuil*, 629 So. 2d at 822 n.5 (deciding case on basis of Florida Constitution); *In re Browning*, 568 So. 2d at 10 (recognizing right of privacy in Florida Constitution); *In re* T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989) (acknowledging privacy right in Florida Constitution).

[155] U.S. CONST. amend I. The amendment also refers to freedom of speech, press, and other rights. *Id.*

freedom through both a discrete religious freedom section[156] and other sections that include religious protection components.[157] For the most part, however, religious freedom remains protected by one provision in the Florida Constitution Declaration of Rights,[158] the words of which track the words of the Establishment and Free Exercise Clauses of the United States Constitution. It adds a prohibition against penalizing free exercise not found in the First Amendment of the United States Constitution. Further, the Florida Constitution provides that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace, or safety,"[159] and explicitly prohibits the use of any public revenues "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[160] The equivalent of the equal protection provision of the Florida Constitution includes an express statement that "[n]o person shall be deprived of any right because of . . . religion."[161] The taxation provisions of the Florida Constitution include a provision allowing property used predominantly for religious purposes to be exempted by general law from taxation.[162] Another provision states that no person shall be exempt from military duty on religious grounds except as provided by law.[163]

A number of religious protections not only exist in the modern 1968 Florida Constitution,[164] but also in the Florida

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[156] FLA. CONST. art. I, § 3. The article provides in part that "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." *Id.*

[157] *See* FLA. CONST. art. I, § 2 (amended 1974) (stating "[n]o person shall be deprived of any right because of . . . religion"); FLA. CONST. art. VII, § 3(a) (amended 1992) (granting tax exempt status to "[s]uch portions of property as are used predominantly for . . . religious . . . purposes"); FLA. CONST. art. X, § 2(a) (stating "no person because of religious creed or opinion shall be exempted from military duty").

[158] FLA. CONST. art. I, § 3.

[159] *Id.*

[160] *Id.*

[161] FLA. CONST. art. I, § 2 (amended 1974).

[162] FLA. CONST. art. VII, § 3(a) (amended 1992).

[163] FLA. CONST. art. X, § 2(a) (amended 1974).

[164] *Twenty-Five Years and Counting: A Symposium on the Florida Constitution*

Constitution since the formation of the State of Florida.[165] Though the Florida courts failed consistently to apply the Florida Constitution when resolving religious freedom issues,[166] during much of the twentieth century, they applied it and found in some circumstances that it guaranteed free exercise[167] and the separation of religion and state,[168] while in other circumstances, found that it failed to protect free exercise[169] and separation of religion and state.[170] Through

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of 1968, 18 NOVA L. REV. 715, 715-1701 (1994).

[165] *See* Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549, 565-68, 614, 617, 625 (1993) (outlining various constitutional provisions impacting religious freedom).

[166] *See* Hermanson v. State, 604 So. 2d 775, 782 (Fla. 1992) (applying state statutes); MacGregor v. Florida Real Estate Comm'n, 99 So. 2d 709, 710-11 (Fla. 1958) (refusing to answer question of unconstitutional religious discrimination); Moore v. Draper, 57 So. 2d 648, 650 (Fla. 1952) (holding compulsory hospitalization statute pertaining to tuberculosis victims constitutional without reference to Florida Constitution); State *ex rel* Hough v. Woodruff, 2 So. 2d 577, 577-78 (Fla. 1941) (holding peddling statute did not apply to religious proselytizer); Hemphill v. Zion Hope Primitive Baptist Church, Inc., 447 So. 2d 976, 977 (Fla. Dist. Ct. App. 1984) (holding First Amendment of United States Constitution not violated by court review of discharge of church employee); Covington v. Bowers, 442 So. 2d 1068, 1069 (Fla. Dist. Ct. App. 1983) (holding court could not interfere with congregation's dismissal of pastor because it would impinge on separation between church and state); Sossin Systems, Inc. v. City of Miami Beach, 262 So. 2d 28, 29-30 (Fla. Dist. Ct. App. 1972) (upholding statute proscribing fraudulent sale of nonkosher food as kosher under First Amendment); Paul v. Dade County, 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (declining to find that lights hung on courthouse in form of cross constituted religious activity under First Amendment).

[167] *See* State *ex rel.* Singleton v. Woodruff, 13 So. 2d 704, 706 (Fla. 1943) (holding municipal ordinance taxing sale of literature unconstitutional as applied to religious groups because statute interfered with free exercise of religion); Cross v. State, 103 So. 636, 638 (Fla. 1925) (holding witness competent to testify without manifesting belief in God).

[168] *See* Henderson v. Antonacci, 62 So. 2d 5, 8 (Fla. 1952) (stating constitutionality of Sunday closing laws may not be upheld on basis of religious tenets because of constitutional provisions requiring separation of church and state); Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181, 183 (Fla. Dist. Ct. App. 1960) (holding separation of church and state required no preference be given to any particular religious sect).

[169] *See* State *ex rel.* Bleich v. Board of Pub. Instruction, 190 So. 815, 816 (Fla. 1939) (declaring requirement of saluting flag in school constitutional and not violation of free exercise of religion).

[170] *See* Division of Pari-Mutuel Wagering v. Florida Horse Council, Inc., 464 So. 2d 128, 131 (Fla. 1985) (holding Sunday closing law of race tracks constitu-

earlier portions of the twentieth century, no clear cut pattern of state constitutional religious freedom doctrine emerged, even in older Jehovah's Witness cases.[171] The four modern blood transfusion cases, *St. Mary's Hospital v. Ramsey*,[172] *Public Health Trust v. Wons*,[173] *In re Dubreuil*,[174] and *M.N. v. Southern Baptist Hospital of Florida, Inc.*[175] illustrate a new, emerging protectiveness of religious belief and practice.

Wons, M.N., Ramsey, and *In re Dubreuil* protected religious freedom in the context of protecting the right to privacy. The Florida Constitution protects the right of every natural person to be free from governmental intrusion into private life.[176] The privacy provision of the Florida Constitution Declaration of Rights[177] was adopted in 1980 to provide the people of Florida with an explicit and free standing state constitutional privacy protection.[178] The Florida courts failed to ap-

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tional); Johnson v. State, 351 So. 2d 10, 12 (Fla. 1977) (stating appearance of religious leaders as witnesses in obscenity prosecution did not violate state constitution); Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304, 307 (Fla. 1971) (upholding constitutionality of educational facilities law under Florida Constitution); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959) (declaring temporary use of school buildings by church constitutional); Koerner v. Borck, 100 So. 2d 398, 401-02 (Fla. 1958) (determining devise of land to county did not offend separation of church and state because baptisms took place on land); Fenske v. Coddington, 57 So. 2d 452, 456 (Fla. 1952) (finding no violation of separation of church and state where no public monies spent); Schatz v. Schatz, 356 So. 2d 892, 894 (Fla. Dist. Ct. App. 1978) (determining divorce provision requiring husband to pay for religious training of children did not violate Florida Constitution).

[171] *See, e.g., Woodruff*, 13 So. 2d at 706 (determining license requirement for distributing religious literature invalid); *Bleich*, 190 So. at 816 (ruling flag saluting requirement in school did not violate students' right to free exercise of religion).

[172] 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

[173] 541 So. 2d 96 (Fla. 1989).

[174] 629 So. 2d 819 (Fla. 1993).

[175] 648 So. 2d 769 (Fla. Dist. Ct. App. 1994).

[176] FLA. CONST. art. I, § 23 (amended 1980).

[177] FLA. CONST. art. I.

[178] *See* Gerald B. Cope, Jr., Note, *Toward A Right of Privacy As a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 633, 691 (1977) (defining "free-standing" as giving privacy separate status as independent right); Gerald B. Cope Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 673, 673-77 (1978) (discussing Florida's proposal to create new right of privacy in

ply the newly adopted state constitutional privacy provision in an understandable and consistent fashion for almost a decade.[179] Though Florida constitutional privacy law remained in flux,[180] two types of privacy protection emerged. First, the Florida courts recognized a right to informational privacy where data, documents and information remained protected from governmental intrusion.[181] Second, the Florida courts recognized a right to behavioral privacy where individual decisions relating to medical care, the refusal of medical care and the right to die remained inviolate.[182] *Wons*, *M.N.*, *Ramsey* and *Dubreuil*, as refusal of blood transfusion cases, fit

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Florida Constitution); Joseph S. Jackson, Note, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565, 565 n.1 (1981) (commenting on "wide scope" of Florida's privacy rights).

[179] Daniel R. Gordon, *One Privacy Provision, Two Privacy Protections: The Right to Privacy in Florida After* Roe v. Wade, 5 WIS. WOMEN'S L. REV. 81, 81-82 (1990). The Florida courts considered over a dozen cases after the passing of the state constitutional privacy provision. *Id.* at 81 n.3. In all of these cases, the courts relied on a general privacy right rather than the constitutional privacy right. *Id.* at 81-82.

[180] John Sanchez, *Constitutional Privacy in Florida: Between the Idea and The Reality Falls the Shadow*, 18 NOVA L. REV. 775, 775-79 (1994). The right to privacy embodies "tort-based privacy and constitutional privacy." *Id.* at 775. The Florida courts have been reluctant to fully expand the zone of privacy provided in article I, section 23 of the Florida Constitution. *Id.* at 777. Thus far, section 23 has had little impact except in the right to die cases. *Id.* at 778-79.

[181] Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985). The Florida Supreme Court interpreted article I, section 23, to provide a "legitimate expectation of privacy in financial institution records." *Winfield*, 477 So. 2d at 548; *see* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 536-37 (Fla. 1987) (determining that privacy right protects blood donors against disclosure of their names, personal information, and other data).

[182] *See In Re* Guardianship of Browning, 568 So. 2d 4, 17 (Fla. 1990) (holding proxy may exercise constitutional right of privacy for one who has become incompetent and refuse medical treatment); *In re* T.W., 551 So. 2d 1186, 1192-93 (Fla. 1989) (declaring constitutional right to privacy extends to right to have abortion and extends to minors); *In re* Guardianship of Barry, 445 So. 2d 365, 370-71 (Fla. Dist. Ct. App. 1984) (determining privacy right allows parents of ten month old child to terminate artificial life support); Corbett v. D'Alesandro, 487 So. 2d 368, 371-72 (Fla. Dist. Ct. App. 1986) (upholding right to have feeding tube removed); *see also* Daniel R. Gordon, *The Right to Die:* Public Health Trust v. Wons *Florida Moves Away from Massachusetts and New Jersey Toward California and Mississippi Despite* Cruzan v. Harmon, 7 N.Y.L. SCH. J. HUM. RTS., Part Two, at 40, 40-42 (1990) (discussing right to die in Florida and other states).

squarely into behavioral privacy involving individual autonomy for choosing and refusing medical treatment.

The protection of religious freedom in *Wons, Ramsey*, and *Dubreuil* involved the balancing of four state interests against the state constitutional right to privacy, with *Ramsey* providing the most complete example of how the Florida courts did so. The *Ramsey* Court adopted four state interests developed in an early Florida privacy case[183] that preceded adoption of the Florida constitutional privacy provision but was later acknowledged as reflecting state constitutional privacy doctrine.[184] The four state interests applied by the *Ramsey* court included preservation of life,[185] protection of third parties,[186] prevention of suicide,[187] and ethics of medical practice.[188] The right of self-determination, however, outweighed even the compelling interest in preserving life. In *Ramsey*, a competent, rational adult made a decision about his own person and his personal life and the State of Florida remained bound to respect that decision.[189]

The *Ramsey* Court said very little about the state interest in preserving the ethics of the medical profession. Instead, it referred to language in *Satz v. Perlmutter*,[190] the early privacy case that preceded the Florida constitutional privacy provision. The *Satz* Court incorporated by reference language from a Massachusetts right to die case, *Superintendent of*

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[183] Satz v. Perlmutter 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980).

[184] *See In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (reviewing behavioral privacy protection under Florida Constitution).

[185] St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985). The preservation of life is a compelling state interest. *Ramsey*, 465 So. 2d at 668.

[186] *Ramsey*, 465 So. 2d at 668-69. The protection of third parties refers mostly to minor children. *Id.* at 668.

[187] *Id.* at 669. The state has a vital interest in preventing suicide. *Id.*

[188] *Id.* The court incorporated by reference the language of *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977). *Ramsey*, 465 So. 2d at 668.

[189] *Ramsey*, 465 So. 2d at 668. The court noted that it would be a more difficult decision if a parent refused a transfusion for a child. *Id.*

[190] 362 So. 2d 160, 163-64 (Fla. Dist. Ct. App. 1978).

Belchertown State School v. Saikewicz,[191] where the court found that modern medical ethics disfavored keeping people alive at all costs and the right of bodily integrity rose above institutional medical considerations.[192]

The state interest that posed the greatest challenge to the *Ramsey* Court was the protection of third parties.[193] The patient in *Ramsey* fathered a child and remained obligated to contribute fifty dollars a week to support the child who lived with the mother.[194] The *Ramsey* Court found that no abandonment would occur if the father died as a result of refusing a blood transfusion because the child resided with the mother, and the father owned a small annuity that benefited the child.[195]

Wons, *In re Dubreuil*, and *M.N.* also involved balancing similar state interests. The *Wons* Court focused only on the state interest in protecting third parties, specifically the patient's two minor children.[196] The *Wons* court found that the state interests in maintaining a home with two parents failed to overcome the patient's rights to refuse blood transfusions.[197] The court implied that no abandonment would occur where the children would receive care from a husband and extended family.[198] *In re Dubreuil* also involved the protection of innocent third parties because the patient would leave

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[191] 370 N.E.2d 417 (Mass. 1977).

[192] *Satz*, 370 N.E.2d at 426-27. The court found no conflict between the patient's right of self-determination and the interests of the doctors, hospitals, or other medical personnel. *Id.* at 427.

[193] St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668-69 (Fla. Dist. Ct. App. 1985). It was difficult because a minor child was involved. *Ramsey*, 465 So. 2d at 668.

[194] *Ramsey*, 465 So. 2d at 667-68. The court struggled with the issue of whether the father's decision to refuse medical treatment, which likely would result in death, constituted abandonment. *Id.* at 668.

[195] *Id.* The court affirmed the trial judge's finding on this issue. *Id.* at 668-69.

[196] Public Health Trust v. Wons, 541 So. 2d 96, 97-98 (Fla. 1989). Norma Wons had a condition which required a blood transfusion but she declined the transfusion on religious grounds. *See supra* notes 130-31 and accompanying text.

[197] *Wons*, 541 So. 2d at 98.

[198] *Id.* at 97. Wons' husband supported the decision, stating that he would care for the children. *See supra* note 131 and accompanying text.

four children if she died as a result of refusing blood transfusions.[199] Like the *Ramsey* and *Wons* courts, the court found that no abandonment existed where a father remained to care for the children. The existence of the father created a presumption that a responsible parent remained to care for the children even where the trial record remained silent about the abilities and desires of the remaining parent.[200]

The state interests in *M.N.* differed to some extent from those in *Wons, In re Dubreuil*, and *Ramsey* because *M.N.* involved parental decision making about transfusions for a minor while *Wons, In re Dubreuil* and *Ramsey* involved competent adults deciding about their own physical care. The *M.N.* court identified the state's interest in preserving human life, the best interests of the minor, and the nature and probabilities of success of the proposed treatments.[201] It never weighed the interests against the parent's right to make fundamental decisions regarding the care of a minor child. The *M.N.* court failed explicitly to identify the parents' interests involved in such fundamental decisions, but the context of the case involved parental objections to medical procedures on religious grounds. Instead, the court remanded the case to the trial court to weigh the different interests.[202] The Florida courts in *Wons, In re Dubreuil, Ramsey*, and *M.N.* preserved the state constitutional right to privacy, but each also recognized the importance of religious freedom.

Wons, In re Dubreuil, Ramsey, and *M.N.* treated religious freedom differently. Religious freedom provided a general backdrop for *M.N.*, but was never discussed by the *M.N.* court. The parents of the child patient in *M.N.* refused to consent to

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[199] *In re* Dubreuil, 629 So. 2d 819, 821 (Fla. 1993).

[200] *In re Dubreuil*, 629 So. 2d at 827-28. In order to rebut the presumption, the court stated that the state must prove by "clear and convincing evidence that [the father] would not properly assume responsibility for the children." *Id.* at 827.

[201] M.N. v. Southern Baptist Hosp., Inc., 648 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 1994). The court stated that the policy of advancing the best interests of the child is well rooted in the state. *M.N.*, 648 So. 2d at 770.

[202] *M.N.*, 648 So. 2d at 771-72. The court surveyed applicable prior law in this area. *Id.* at 771. Nonetheless, the court did not feel that the lower court had fully considered all of the competing interests. *Id.*

the blood transfusion because their religious beliefs forbade such.[203] According to the opinion, the religious objection to blood transfusions constituted the parents' case, though the parents also expressed concern that the proposed course of treatment would cause their child suffering.[204] The bulk of the court's analysis involved the Florida constitutional right to privacy, specifically the right to die.[205] The *M.N.* court transformed a context involving the free exercise of religious beliefs into one involving a privacy analysis. *M.N.* was the latest of the four Florida blood transfusion cases,[206] and the subtle interconnection between religion and privacy reflected well the symbioses between religion and privacy recognized in Florida constitutional law.

The *Ramsey* court recognized religious conviction and religious freedom as an aspect of personal private life. It found that the right to self determination became more compelling in the presence of deeply held religious convictions.[207] However, religious conviction and freedom created only one reason among many for an adult to reject medical treatment.[208] In *Ramsey*, religious conviction and freedom failed to create a separate state constitutional protection, but instead provided a special emphasis and compulsion to the right of privacy. Though the *Wons* court explicitly recognized two distinct rights, the right of privacy and the right of religious freedom,[209] it utilized an analysis that combined religiosity and

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[203] *Id.* at 770. The exact nature of the religious sect was not identified. *Id.*

[204] *Id.*

[205] *Id.* at 771. The right to refuse medical treatment had been extended to children by earlier Florida decisions. *Id.*; *see In re* Guardianship of Barry, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984) (finding parents had right to discontinue medical care for child lacking cognitive brain functioning).

[206] *M.N.* was decided in 1994, while *Ramsey*, *Wons*, and *In re Dubreuil* were decided in 1985, 1989, and 1993 respectively.

[207] Saint Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985).

[208] *Ramsey*, 465 So. 2d at 668. The court recognized the risks involved with blood transfusions, along with the danger of receiving impure blood. *Id.*

[209] Public Health Trust v. Wons, 541 So. 2d 96, 97 (Fla. 1989). The issue of whether an adult may refuse medical treatment forces the courts to balance the state's interest in maintaining life against an individual's right to privacy and

privacy. Adopting the opinion of the appellate court below, the Florida Supreme Court found that the individual possessed the right to be left alone in order to lead her or his private life according to her or his own beliefs, and that religion was the most private aspect of an individual's life.[210] The special concurrence in Wons analyzed the importance of religious freedom in Florida state constitutionalism more extensively than any of the four blood transfusion court majority opinions, intertwining privacy and religious freedom.[211] In *In re Dubreuil*, the court explicitly applied the religious freedom and privacy provisions of the Florida Constitution,[212] but the thrust of the court's analysis involved the right to privacy. For example, the court began its analysis with what the court characterized as the overreaching principle that competent adults have a privacy right to refuse medical treatment.[213]

In *Ramsey, Wons*, *In re Dubreuil*, and *M.N.*, the Florida courts recognized an intertwined right of religious freedom and privacy which protects individuals from state interference when individuals seek to protect their religious beliefs. These blood transfusion cases raise serious implications about the relationship between free exercise and disestablishment and provide some important insights into how to resolve the current constitutional war between the Free Exercise and Establishment Clauses.

IV. Florida Constitutional Law Lessons for Federal Constitutional Protections of Religious Freedom

The four Florida blood transfusion cases provide a number of lessons for Establishment Clause and Free Exercise Clause

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right to practice her or his religion. *Wons*, 541 So. 2d at 97.

[210] *Wons*, 541 So, 2d at 98.

[211] *Id.* at 100-02 (Ehrlich, C.J., concurring).

[212] *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993). The court applied article I, section 23 of the Florida Constitution, which had been found earlier to guarantee that "a competent person has the constitutional right to choose or refuse medical treatment." *In re Dubreuil*, 629 So. 2d at 822 (quoting *In re* Guardianship of Browning, 568 So. 2d 4, 11 (Fla. 1990)).

[213] *In re Dubreuil*, 629 So. 2d at 822.

law, suggesting one resolution to the war. First, the Florida courts blurred the line between free exercise and establishment. Though *In re Dubreuil* and a special concurrence in *Wons* characterized the cases as ones involving free exercise,[214] three of the decisions utilized broader or implicitly broader characterizations of the religious issues. *Wons* characterized the issue as religious freedom and the constitutional right to practice one's religion.[215] *Ramsey* acknowledged that the patient's wishes were more compelling because of his "deeply held religious convictions."[216] The *M.N.* court simply wrote a broad opinion concerning the right to die and refuse treatment in the context of religious beliefs.[217] Even *In re Dubreuil* provided a broader privacy analysis, shunning a narrower free exercise analysis.[218] All of the cases implied that religious freedom should not be strictly classified in Establishment Clause or Free Exercise Clause contexts, which the federal courts have tended to do. For instance, the United States Supreme Court decisions of *Rosenberger v. Rector of University of Virginia*[219] and *Capitol Square Review & Advisory Board v. Pinette*[220] both conceived the issues of religious freedom in terms of resolving tensions between free exercise and establishment.[221] The four Florida cases suggested a broad relationship between the power of the state and religious believers, and once such a relationship became estab-

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[214] *In re Dubreuil*, 629 So. 2d at 822; *Wons*, 541 So. 2d at 102 (Ehrlich, C.J., concurring).

[215] *Wons*, 541 So. 2d at 97. The *Wons* court asserted that to force the patient to receive unwanted medical care would breach her or his fundamental constitutional right of freedom of religion. *See supra* note 132.

[216] Saint Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985). The court noted the reasonableness of a patient choosing everlasting salvation over a few more living hours on earth. *Ramsey*, 465 So. 2d at 668.

[217] M.N. v. Southern Baptist Hosp. of Fla. Inc., 648 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 1994). A major consideration for the court in *M.N.* was the parents' right to make fundamental decisions for their minor children, including religious practice. *M.N.*, 648 So. 2d at 771.

[218] *In re* Dubreuil, 629 So. 2d 819, 824-28 (Fla. 1993).

[219] ___ U.S. ___, 115 S. Ct. 2510 (1995).

[220] ___ U.S. ___, 115 S. Ct. 2440 (1995).

[221] *Rosenberger*, 115 S. Ct. at 2517-24; *Capitol Square*, 115 S. Ct. at 2445-49.

lished, the relationship should cover both Establishment Clause and Free Exercise Clause problems and contexts.

The Florida Jehovah's Witness blood transfusion cases defined a relationship between the power of the state of Florida and the religious believers and actors. The state must defer to the religious believer because, as the *Wons* Court found, "[s]urely nothing, in the last analysis is . . . more sacred than one's religion."[222] Respect for individual wishes becomes more compelling in the presence of deeply held religious beliefs.[223] The state's interests, even very compelling ones, must be weighed against individual costs, including spiritual costs.[224] Without doubt, the blood transfusion cases imply strongly that the state of Florida must avoid weakening religious beliefs. However, the cases shun creating a dichotomy between religious beliefs and actions.

The vitality of religious practices remains important to the state of Florida. Respect must be accorded actions, even life threatening ones such as refusing blood transfusions, motivated by deeply held religious convictions, such as a preference for everlasting life and salvation.[225] The Florida courts must remain sensitive to the fact that some acts will create in religious people strong responses. For instance, a Jehovah's Witness forced to accept blood even to save her life would also be forced to live with the knowledge of having sinned, another type of action.[226] Religious action remains equally valued to non-religious action. A religious mother who accepted blood would save her life but she also would fail to set an example for her children about following religious law. The state of Florida should respect the right of a parent to act

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[222] Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (quoting Wons v. Public Health Trust, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987)).

[223] Saint Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985).

[224] *Wons*, 541 So. 2d at 100 (Ehrlich, C.J., concurring). The spiritual costs must be weighed from the point of view of the patient, who, in this case, believed that a blood transfusion was a terrible sin. *Id.* (Ehrlich, C.J., concurring).

[225] *See supra* note 216 and accompanying text.

[226] *Wons*, 541 So. 2d at 100 (Ehrlich, C.J., concurring).

religiously in order to inculcate respect for religion in children.[227]

The Florida courts in the blood transfusion cases empowered the individual to hold religious beliefs and act religiously. Action and belief blended, resulting in each supporting the other. Religious behavior, including behavior that threatened life, sprang from deeply held conviction.[228] The Florida courts found merit for individuals in acting and believing religiously. For instance, the concurrence in *Wons* recognized that human actions involved spiritual costs in addition to economic and emotional costs.[229] Certainly, respect must be accorded those who minimized their spiritual costs. This view of the deep importance of religious belief and action implied an additional importance of religion and religiosity to Florida society. One opinion characterized the right to make private decisions based on conscience, including religious beliefs, as the bedrock on which America was founded.[230] Religious action certainly represented an important educational link between parent and child.[231]

Though the courts in the blood transfusion opinions never explained the importance of religion to Florida society, a sense of that importance evolves from the respect the court accorded to religion and religiosity and the connection between religion, parenting, and spiritual well being. The modern United States Supreme Court cases involving Free Exercise and the Establishment Clauses lack the respect and understanding that the

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[227] *Id.* at 102 (Ehrlich, C.J., concurring). A parent could not expect her children "to follow what she believes is God's law if she herself does not." *Id.* (Ehrlich, C.J., concurring).

[228] *Ramsey*, 465 So. 2d at 668.

[229] *Wons*, 541 So. 2d at 100 (Ehrlich, C.J., concurring). A Jehovah's Witness forced to receive a blood transfusion would believe that she has committed a grievous sin, and believe that if she became ill again, she would again be forced to sin. *Id.* (Ehrlich, C.J., concurring).

[230] *Id.* at 98 (citing Wons v. Public Health Trust of Dade County, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987)).

[231] *Id.* at 102 (Ehrlich, C.J., concurring). The patient believed that in refusing a blood transfusion, she was doing what was in her children's best interests by showing them how to follow what she believed was God's will. *Id.* (Ehrlich, C.J., concurring).

Florida courts accord to religion and religiosity. In *Capitol Square,* the Court found that religious expression should receive as much or more protection than private expletives and pornography,[232] but failed to discuss the nature of religion. In *Rosenberger*, the Court eloquently defended the intellectual diversity of modern American universities,[233] but failed to focus for a significant amount of time on the nature of religious belief. In his concurring opinion in *Rosenberger*, one justice discussed religion in the context of the formulation and adoption of the First Amendment.[234] The Supreme Court in *Employment Division v. Smith*[235] deferred to state authority by limiting the compelling interest test when analyzing Free Exercise Clause claims.[236] The *Smith* court protected state law enforcement from a diversity of religious practices.[237] Unlike the modern Supreme Court, the Florida courts in the blood transfusion cases developed a basic understanding of and respect for religion and religiosity for individuals and for Florida society.

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[232] Capitol Square Review & Advisory Bd. v. Pinette, ____ U.S. ____, 115 S. Ct. 2440, 2449 (1995). The right to private religious expression receives additional protection from the Free Exercise Clause. *Capitol Square*, 115 S. Ct. at 2449.

[233] Rosenberger v. Rector of Univ. of Va., ____ U.S. ____, 115 S. Ct. 2510, 2520 (1995). "For the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." *Rosenberger*, 115 S. Ct. at 2520.

[234] *Rosenberger*, 115 S. Ct. at 2528-33 (Thomas, J., concurring). Justice Thomas explained that the Framers, by drafting the Establishment Clause, in no way meant to take from religious practices any of the government support provided to non-religious activities. *Id.* (Thomas, J., concurring).

[235] 494 U.S. 872 (1990).

[236] *Smith*, 494 U.S. at 884-89. The Court expressly held that the compelling interest test would not apply to criminal prohibitions on certain conduct, even if that conduct is prescribed by a religion. *Id.* at 884-85.

[237] *Id.* at 888-90. The *Smith* case involved two men who were denied unemployment benefits after they were fired for ingesting the controlled substance peyote. *Id.* at 874. The use of peyote was necessary to the religious worship of the men through their membership in the Native American Church. *Id.* The Court refused to apply the compelling interest test, for to do so would deem "presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id.* at 888 (emphasis omitted).

The basic respect for religion evinced by the Florida courts was supported by two state constitutional analyses. First, *Wons, In re Dubreuil*, *Ramsey*, and *M.N.* avoided depreciating religious belief in favor of secular belief. The courts in these cases preferred the religious over what can be described as the secular sacred, which are secular beliefs held deeply as if they were religious. The best examples of the secular sacred were provided by the four primary state interests outlined in *Ramsey*: preservation of life; prevention of suicide; protection of third parties, especially children; and ethics of medical practices.[238] In the blood transfusion cases, these interests and the one adapted to the context of the infant in *M.N.*[239] became pitted against religious beliefs. The courts implied an antagonism between religious beliefs and the four state interests. Hence, the Florida courts viewed the four state interests emerging from the secular and not the religious. The four interests represented secular assumptions concerning what is most important in Florida society and law.

The compelling state interests in the preservation of life and prevention of suicide evinced the strong value placed on the will to live in Florida law. That the Florida courts value the will to live creates no surprise as the Florida Declaration of Rights declares the rights to defend and enjoy life as inalienable.[240] The protection of third parties in the blood transfusion cases really translates into the duty of parents to care for their children.[241] The ethics of medical practice serves as a corollary to the preservation of life. If life itself is sacred, the means of sustaining life logically become precious.

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[238] Saint Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668-69 (Fla. Dist. Ct. App. 1985). The *Wons* court characterized all four interests as compelling. Public Health Trust v. Wons, 541 So. 2d 96, 97 (Fla. 1989). The four factors did not create a bright-line test, but were "intended merely . . . to be considered while reaching the difficult decision of when a compelling state interest may override the basic constitutional rights of privacy and religious freedom." *Wons*, 541 So. 2d at 97.

[239] *See supra* note 217.

[240] FLA. CONST. art. I, § 2.

[241] *See In re* Dubreuil, 629 So. 2d 819, 824-28 (Fla. 1993) (delving into state's interest in preventing abandonment of children).

What is remarkable about the blood transfusions cases is how the sacred secular gave way to the religious. The most striking example is *M.N.*, where the court refused to prefer the preservation of life and the health care means of preserving life of an infant over the religious beliefs of the parents. Instead, the Florida court remanded the case to the trial court so that the trial court could weigh and balance competing interests.[242] Even the life of an infant failed to receive automatic protection from the sacred secular values.

In addition to the depreciation of the sacred secular, the Florida courts recognized and valued the private and individual nature of religious belief. One court characterized the blood transfusion cases as involving an overlap of the right of privacy and religious freedom, specifically free exercise.[243] The right of religious freedom in the blood transfusion cases grew out of the right of privacy.[244] Religion is the most private of human beliefs and actions.[245] The Florida courts utilized two integral aspects of the Declaration of Rights, privacy[246] and religious freedom[247] to protect religiosity in Florida. What is remarkable about the double protection of privacy and religious freedom is the blending and intermixing of religion and privacy. Throughout the four cases, the two protections overlap analytically. Religion is transformed into a personal and private affair and not a community[248] and public enterprise.[249]

The Florida blood transfusion cases allowed the Florida courts to begin to develop a constitutional theory of religion and law. More than one provision of the Florida Constitution

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[242] *See supra* note 202 and accompanying text.

[243] *In re Dubreuil*, 629 So. 2d at 822.

[244] *See supra* notes 202-12 and accompanying text.

[245] Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989).

[246] FLA. CONST. art I, § 23.

[247] *Id.* § 3.

[248] Glendon & Yanes, *supra* note 2, at 537-38, 544, 546.

[249] Gaffney, *supra* note 2; *see also* Frederick Mark Gedicks, *The Religious, The Secular and the Antithetical*, 20 CAP. U. L. REV. 113, 126 (1991) (stating "[p]ublic life goes on without religion, although large numbers of Americans remain religiously faithful in private").

protects religious freedom and it has not been characterized and analyzed in narrow Establishment Clause and Free Exercise Clause contexts. Instead, religious freedom has been characterized as a broadly protected category that could implicate free exercise and establishment issues. Clearly, the Florida courts identified the individual, and by implication, broader social values of religion, religious belief, and religious practices. The Florida courts made a commitment to protect those social values. Logically, whether the issue is one of free exercise or establishment should not matter. What should matter is how religious experience is protected from state interference, that the sacred secular receive no more protection than the religious sacred, and that religious experience remains a personal and private matter. The emerging Florida state constitutional theory of religion and law provides the federal courts and Congress with an example of how to avoid the ongoing constitutional war between free exercise and establishment. The Florida courts have expressed important and substantial reasons for valuing religious experience in Florida, and placing that experience under the same protection as the secular.

V. Florida's Interests in Avoiding a War Between Free Exercise and the Establishment Clause

During the later years of the last decade, when the Florida courts began to develop a state constitutional theory of religious freedom in *Ramsey, In re Dubreuil, Wons*, and *M.N.*, the Florida courts recognized the prime importance of the Florida Constitution in protecting the individual rights of Floridians.[250] In 1989 and 1990, the Florida Supreme Court gradually adopted a primacy application of the Florida Declaration of Rights in an abortion rights case, *In re T.W.*,[251] and a

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[250] *See* Daniel Gordon, *Good Intentions-Questionable Results: Florida Tries The Primacy Model*, 18 NOVA L. REV. 759, 759-73 (1994) (discussing development of primacy approach). At least seven other states have adopted a primacy approach to the "protection of individual rights." *Id.* at 759.

[251] 551 So. 2d 1186 (Fla. 1989).

right to die case, *In re Browning*.[252] The primacy model requires state courts to utilize a state constitution prior to the federal constitution when resolving and analyzing individual rights issues.[253] State constitutions become the primary protectors of human rights and the federal constitution becomes applicable only when the state constitution fails to provide protection.[254] The Florida Supreme Court openly and explicitly adopted a primacy application in *Traylor v. State*,[255] a 1992 criminal procedure case. The Traylor court found "Florida's state courts . . . bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein."[256] One of the blood transfusion opinions explicitly recognized the primacy application of the religious freedom and privacy provisions of the Florida Constitution.[257]

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[252] 568 So. 2d 4 (Fla. 1990).

[253] *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 379-80 (1980) (stating primary protection of individual freedoms is matter of state concern); *see also* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647-48 (1987) (summarizing primacy approach). "[P]rimacy courts focus on the state constitution as an independent source of rights . . . ." *Id.* at 647.

[254] *See* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 648-49 (1983) (promoting primacy approach); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500-02 (1977) (noting state provisions sometimes antedate federal protection of individual rights). "[T]he decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Id.* at 502.

[255] 596 So. 2d 957, 962-63 (Fla. 1992). The *Traylor* court noted that the Florida Declaration of Rights created "distinct freedom[s] guaranteed to each Floridian against government intrusion." *Traylor*, 596 So. 2d at 963. It analyzed protection from compelled confession, as well as the "right to choose one's manner of representation." *Id.* at 964-67.

[256] *Traylor*, 596 So. 2d at 962. The *Traylor* court further stated that "[f]ederal and state bills of rights thus serve distinct but complimentary purposes." *Id.* The Florida Declaration of Rights gives maximum protection to the individual. *Id.* at 963.

[257] *In re Dubreuil*, 629 So. 2d 819, 822 n.5 (Fla. 1993) (citing *Traylor*, 596 So. 2d at 962-63). In Florida, the right to refuse medical care is a state constitutional right. *In re Dubreuil*, 629 So. 2d at 822.

In requiring a primacy approach to resolve individual rights issues in Florida, the *Traylor* Court described a methodology for constructing and interpreting state constitutions.[258] The *Traylor* court found that:

> [S]tate courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.[259]

Applying these factors insures that the Florida Declaration of Rights will be utilized by the Florida courts in a way that expresses the breadth of common yearnings for freedom by the people of Florida.[260]

The four Florida blood transfusion cases failed to explicitly identify specific factors unique to the Florida experience when interpreting and applying the religious freedom and privacy provisions. However, elements of the Florida experience support those decisions, which include the personal and private nature of religiosity, the importance of spiritual life, and the equality of religion with the sacred secular. First, the history of Florida constitutional law reflected sensitivity to the personal and private nature of religious experience. The first Florida Constitution conceived of religious freedom in the context of conscience. The religious freedom provision in force at the organization of Florida as a state protected the right of all men "to worship . . . according to the dictates of their own conscience."[261] "Conscience" was stated in the singular, high-

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[258] *Traylor*, 596 So. 2d at 961-62. The *Traylor* court justified the primacy approach by noting that "[i]n any given state the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." *Id.* at 962.

[259] *Id.* The court noted that the primacy approach allowed each state's courts to develop "alternative methods of constitutional analysis." *Id.*

[260] *Id.* at 963. The *Traylor* court cautioned against a reflex action to crime whereby individual freedom for all would be sacrificed in an attempt to punish wrongdoers. *Id.* at 963-64.

[261] FLA. CONST. of 1838, art I, § 3. The initial Florida Constitution was drafted

lighting the personal and private nature of conscience and worship.[262] The word "own" served as an adjective to "conscience," reinforcing the personal and private nature of religious experience. Early Florida law and tradition avoided conceiving of religion in community organizational terms. Even the Establishment Clause utilized the words "any religious establishment, or mode of worship" instead of "religion" or "church."[263] Interestingly, the *Wons* Court in 1989 conceived of private decision making as a matter of personal conscience, acknowledging that the right to make private decisions served as a "bedrock" on which America was founded.[264] The *Wons* court, much like Florida's original constitution, modified conscience with the word "own," highlighting the singular and personal nature of conscience.[265]

The historical deference in Florida to the personal and private nature of conscience and worship became reinforced in 1980 by the adoption of the free standing state constitutional privacy provision.[266] When Florida adopted the privacy provision, only a few other states included such a privacy provision

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by a territorial convention in 1838, and became effective in 1845 when Florida was admitted to statehood. Little & Lohr, *supra* note 165, at 555 & n.28.

[262] Not all early American state constitutions utilized the singular of conscience. Some such as Pennsylvania and North Carolina utilized the plural form "consciences." *Compare* FLA. CONST. OF 1838, art. I, § 3, *with* N.C. CONST. OF 1776, DECLARATION OF RIGHTS XIX *and* PA. CONST. OF 1838, art. IX, § 3, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3113 (Francis Newton Thorpe, ed., 1909). The Pennsylvania provision recognized the personal nature of the religious experience. PA. CONST. OF 1838, art. IX, § 3.

[263] FLA. CONST. OF 1838, art. I, § 3.

[264] Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (quoting Wons v. Public Health Trust, 500 So. 2d 679, 686-87 (Fla. Dist. Ct. App. 1987)). "[A]n individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable governmental interference." *Public Health Trust*, 500 So. 2d at 687.

[265] *Wons*, 541 So. 2d at 98. The court emphasized that Mrs. Wons' rights of privacy and religion were at stake when the hospital sought to require her to accept a blood transfusion. *Id.* The appeals court adopted the district court's use of "own." *Id.* (quoting *Public Health Trust*, 500 So. 2d at 686-87).

[266] FLA. CONST. art I, § 23. "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." *Id.*

in their state constitution.[267] The provision emerged from political leadership concerns about the intrusiveness of Florida government,[268] and the legislative proposal for the privacy provision even survived charges that marijuana production and homosexual conduct would be furthered by a state constitutional law privacy provision.[269] The privacy provision revealed a modern Florida constitutional commitment to leaving the individual alone. The personal and private nature of religion remained supported not only by constitutional history and modern constitutionalism, but also by the religious makeup of the people of Florida.

The need to protect spirituality and insure that the religious is not overwhelmed by the sacred secular is supported by the social conditions of Florida. Only 44% of Floridians were members of churches in 1990.[270] Florida's northern neighbors, Georgia and Alabama, boasted 58% and 71% church membership respectively in 1990 while Texas and New York had respectively 64% and 66%.[271] The relatively low church membership evidenced both weakness and strength concerning religiosity in Florida. First, the minority status of church membership highlighted the need to protect religion and religious experience from political and governmental choices favoring secular sacred matters such as the preservation of life, the ethics of the health industry, and parenting and parental responsibility. Also, low church membership may well reflect the existence of religious people who remain unaffiliated. Further,

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[267] *See generally* Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law*, *supra* note 178, at 690-727 (analyzing and comparing protection of privacy rights under state constitutional provisions); Memorandum from Senate Staff to Senate President (Oct. 22, 1980) [hereinafter *Senate Staff Analysis*] (discussing Staff Analysis and Economic Impact Statement of H.J.R. 387) (on file with author). Alaska, Montana, and California were the leading states in granting extensive privacy protection as a matter of state law. Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law*, *supra* note 178, at 692.

[268] *See* 26 FLA. CONST. REVISION COMM'N 6837 (Mar. 8, 1978).

[269] *See Senate Staff Analysis*, *supra* note 267 (commenting on state of predictions).

[270] MARTIN B. BRADLEY ET AL., CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES 1990 16 (1992).

[271] *Id.* at 12, 16-17, 27, 32-33.

Florida boasts large numbers of newcomers and retirees.[272] Such people may avoid church membership because they lack a long term commitment to their communities. Hence, Florida law needs to relate to religion as a private and personal matter because organized religion remains a minority manifestation and many unaffiliated religious people may exist.

Florida constitutionalism must also treat religion as a personal and private matter in order to avoid showing preference to one religious group or a set of religious groups. Religion in Florida in 1990 remained a diverse proposition. One hundred and three denominations reported membership in 1990.[273] No religion boasted membership greater than 12% of the population.[274] More than thirty of the Florida's sixty-seven counties had no majority religion in 1990, including populous counties like Dade, Broward, Palm Beach, Pinellas, Hillsborough, and Orange.[275] Broward County, with a population of 1,255,000 in 1990,[276] had no religion come even close to dominating church membership, as 37% of congregation members were Catholics while 29% were Jewish.[277] In Palm Beach County, 30% of congregation members were Jewish while 29% were Catholic.[278] In Duval County, the county where Jacksonville is located, 53% of church members were Baptists.[279]

Historical deference to personal conscience, modern commitments to privacy, religious diversity, and the minority status of organized religion in Florida created the religious and social context for the four Florida blood transfusion cases. The religious freedom and privacy provisions of the Florida Constitution reflected this historical, modern policy and social envi-

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[272] TOM FIEDLER & MARGARET KEMPEL, ALMANAC OF FLORIDA POLITICS 6-7 (1994).

[273] *See* BRADLEY, *supra* note 270, at 16.

[274] *Id.*

[275] Bradley, *supra* note 270, at 83.

[276] FIEDLER & KEMPEL, *supra* note 272, at 182.

[277] BRADLEY, *supra* note 270, at 83.

[278] *Id.* at 90-91.

[279] *Id.* at 85. Thirty-seven percent were members of the Southern Baptist Convention while 15% were reported as members of "Black Baptist" churches. *Id.*

ronmental contexts. A respect for religiosity and a commitment to the personal and private nature of religious experience grew from these historical and modern Florida conditions.

VI. Conclusion: The Florida Way of Healing the Wounds of War Between Free Exercise and Establishment

Public Health Trust v. Wons,[280] *In re Dubreuil*,[281] *St. Mary's Hospital v. Ramsey*,[282] and *M.N. v. Southern Baptist Hospital*[283] provided Florida law with a fairly coherent conceptualization of the relationships between religion and governmental power. These cases took a broad or vague view of religious freedom that avoided characterizing religious issues consistently as free exercise or disestablishment problems.[284] Instead, the Florida courts expressed a deep respect for religious experiences, finding strong value for religion for individuals, and by implication, for Florida society.[285] Religion became equal with such secular sacred matters as parenting and health care.[286] Religion became conceived of as inextricably private, personal, and individualistic.[287] The social and historical contexts of Florida supported the four blood transfusion decisions in their views of religious freedom.[288]

The four blood transfusion cases provide an example for the federal courts and Congress for healing the rift between the Establishment and Free Exercise Clauses identified in *Illinois ex rel McCollum v. Board of Education*[289] and continued during 1995 in *Capitol Square Review & Advisory Board v. Pinette*[290] and *Rosenberger v. Rector of University of Virgin-*

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[280] 541 So. 2d 96 (Fla. 1989).
[281] 629 So. 2d 819 (Fla. 1993).
[282] 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).
[283] 648 So. 2d 769 (Fla. Dist. Ct. App. 1994).
[284] *See supra* notes 202-17 and accompanying text.
[285] *See supra* notes 214-30 and accompanying text.
[286] *See supra* notes 188-201 and accompanying text.
[287] *See supra* notes 206-14 and accompanying text.
[288] *See supra* notes 242-72 and accompanying text.
[289] 333 U.S. 203 (1948).
[290] 115 S. Ct. 2440 (1995).

ia.[291] The Florida blood transfusion cases involved a deep appreciation for religion, and the Florida historical and modern contexts supported that respect for religious beliefs and experiences. More than one provision of the Florida Constitution protects religious freedom, including a privacy provision facially unrelated to religious freedom. The four blood transfusion cases alleviated the need for the free exercise exclusion zone[292] found in *Abington School District v. Schempp*,[293] because the Florida cases understood the personal, individualistic, and private nature of religious experience. Where the state sought to coerce sacred secular behavior such as accepting a blood transfusion, the personal and private nature of religion forbade such coercion. The same could easily be said about the state requiring school children to pray in an educational context. The Florida blood transfusion cases also avoided the deference to state power in the context of religious practice reflected in *Employment Division v. Smith*.[294] Most importantly, the Florida blood transfusion cases imply that a strong respect for religious experience as a personal, private and individual value would protect both the free exercise of religion and the disestablishment of religion.

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[291] 115 S. Ct. 2510 (1995).
[292] *See supra* notes 242-48 and accompanying text.
[293] 374 U.S. 203 (1963).
[294] 494 U.S. 872 (1990).

REVIEW ESSAY

INSIDE THE SUPREME COURT: A SANCTUM SANCTORUM?

THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT

By Bernard Schwartz.[*] *New York: Oxford University Press. 1996. Pp. 492. $45.*

James A. Thomson[**]

"Five votes can do anything around here."[1]

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[1] BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6 (1996) (attributed to Justice William J. Brennan when emerging from a "heated conference" of the Justices); *see also id.* at 8; *infra* note 146; JAMES E. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 54 (1995) ("Brennan's five finger exercise . . . . 'Five Votes. Five votes can do any-

I. INTRODUCTION

Peering behind "the red curtain"[2]—into the Supreme Court's sanctum sanctorum—no longer[3] remains susceptible to charges of voyeurism.[4] Largely,[5] this revolution was insti-

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thing around here'") (quoting Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, March 12, 1990, at 45, 60). Compare: "Who in hell cares what anybody says about [constitutional questions] but the Final Five of the August Nine . . . ?" Letter from Learned Hand to Justice Stone (Feb. 6, 1934) (quoted in ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 384 (1956)).

[2] BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT 3, 18, 26 (1996); *see also* SCHWARTZ, *supra* note 1, at xii (using term "red velour curtain"). For colored photographs of "the red curtain" *see, e.g.,* MARY ANN HARRELL, EQUAL JUSTICE UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 122, 124-25 (rev. ed. 1988); ROBERT SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES 8-9 (1986).

[3] Earlier debates were particularly generated by Mason, *supra* note 1 (utilizing Justice Stone's files containing draft opinions and detailed memoranda) and BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). Critics of Mason's use of internal court documents included Edmond Cahn, *Eavesdropping on Justice*, 184 NATION 15 (Jan. 5, 1957); Allison Dunham, Book Review, 24 U. CHI. L. REV. 794 (1957); Mark DeWolfe Howe, Book Review, 72 POL. SCI. Q. 122 (1957); Allan F. Westin, Book Review, 66 YALE L.J. 462 (1957). Applause for Mason includes Bennett Boskey, *A Justice's Papers: Chief Justice Stone's Biographer and The Saboteurs' Case*, 14 n.3 SUP. CT. HIST. SOC. Q. 10 (1993); John P. Frank, Book Review, 9 STAN. L. REV. 621 (1958); J. Woodford Howard, Jr., *Alpheus T. Mason and the Art of Judicial Biography*, 8 CONST. COMM. 41 (1991); Samuel J. Konefsky, Book Review, 52 AM. POL. SCI. REV. 1135 (1957); Philip B. Kurland, Book Review, 70 HARV. L. REV. 1318 (1957); Harold R. Medina, *Mason's Stone*, 57 PRINCETON ALUMNI WEEKLY 9 (1957); J.W. Peltason, *Supreme Court Biography and the Study of Public Law*, in ESSAYS ON THE AMERICAN CONSTITUTION 215, 223-27 (Gottfried Dietze, ed., 1964); Clyde Spillenger, *Lifting the Veil: The Judicial Biographies of Alpheus T. Mason*, 21 REV. AM. HIST. 723 (1993). *See also* ALPHEUS T. MASON, THE SUPREME COURT FROM TAFT TO BURGER 219-24 (3d ed. rev., 1979) (reply to critics); Alpheus T. Mason, *Evesdropping on Justice: A Review Essay*, 95 POL. SCI. Q. 295 (1980) (reviewing WOODWARD & SCOTT, *supra*). For discussion generated by THE BRETHREN, see, for example, Ronald J. Fiscus, *Studying* THE BRETHREN: *The Legal Realist Bias of Investigative Journalism*, 1984 AM. B. FOUND. RES. J. 487; Mason, *supra*; Richard Saphire, *The Value of* The Brethren: *A Response to Its Critics*, 58 TEX. L. REV. 1475 (1980).

[4] "Peering" is assisted not only by documentation (see, e.g., *supra* note 2 and *infra* notes 5, 6, 12 & 22) and oral evidence (*see infra* note 8), but also by photographs. *See, e.g.,* HARRELL, *supra* note 2, at 122-51; FRED J. MAROON (text) & SUZY MAROON (photographs), THE SUPREME COURT OF THE UNITED STATES (1996); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 154 (Justice Holmes' library), 161 (Justice Reed's chambers), 235 (Chief Justice

tuted and institutionalized by Professor Bernard Schwartz.[6]

Rehnquist's chambers), 240 (Supreme Court conference room), 318 (Justice White's chambers), 324 (Justice Brennan's chambers) (3d ed. 1993); SHNAYERSON, *supra* note 2, at 8-27; WOODWARD & ARMSTRONG, *supra* note 3, between 212-13 (photographs of chambers of Justices Brennan, Stewart, White, Blackmun, Powell, Rehnquist, Douglas, Marshall, Stevens and Chief Justice Burger). For other colored photographs of Justices' chambers, the Justices' robing room, and the Supreme Court conference room, see EQUAL JUSTICE UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE (1965, 1975, 1982, 1988 editions). Prior to 1935, when it moved to its present building, the Supreme Court had been in several locations. It commenced "on February 1, 1790 . . . [in] the Exchange Building in New York City" and moved to "Independence Hall, known as The State House, and . . . Old City Hall" in Philadelphia before convening "in various rooms in the basement of the Capitol," Washington, D.C., "[b]etween 1801 and 1809" except for meeting "for a year in Long's Tavern." O'BRIEN, *supra*, at 143-46. From 1810 to 1814 the Court met "in a room designed for [its] use" in the Capitol and from 1814 to 1816 "in a rented House, the Bell Tavern." From 1817 to 1819 the Court met "in a small room" in the Capitol. Its "courtroom" in the Capitol was "restored" in 1819. *Id.* at 146. In 1860 the Court "moved upstairs" to "the Old Senate Chamber" between the new Senate and House of Representatives' Chambers. *Id.* at 147. Between 1864 and 1888 "conferences were held downstairs in a 'consultation room'" and between 1888 and 1910 were held in Chief Justice Fuller's "home." *Id.* at 151-52.

[5] Prior examples include ALEXANDER BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK (1957); DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964); J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968); WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910 (1950); MASON, *supra* note 1, WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); David N. Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 N.W. U. L. REV. 716 (1974); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979). Even earlier Professor Frankfurter concluded: "The intimacies of the conference room—the workshop of the living Constitution—are illuminations denied to the historian . . . . Divisions on the Court and the greater clarity of view and candour of expression to which they give rise, are especially productive of insight. Moreover, much life may be found to stir beneath even the decorous surface of unanimous opinions." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 9 (Quadrangle Books 1964) (1937). *Compare* Justice Frankfurter's subsequent observation: "[T]he Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court. But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations." Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-14 (1955).

[6] "Professor Bernard Schwartz is best known as a prolific historian of the deliberations of the modern Supreme Court." David P. Bryden, Book Review, 8

CONST. COMM. 336 (1991) (reviewing BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK (1990)). In addition to SCHWARTZ, *supra* note 1, Professor Schwartz's publications of internal Supreme Court documents include SCHWARTZ, *supra* note 2; BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT (1988); BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT (1988); BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY (1983); BERNARD SCHWARTZ & STEPHEN LESHER, INSIDE THE WARREN COURT (1983); Bernard Schwartz, *Rehnquist*, Runyon, *and* Jones—*The Chief Justice, Civil Rights, and Stare Decisis*, 31 TULSA L.J. 251 (1995); Bernard Schwartz, *"Brennan vs. Rehnquist—Mirror Images in Constitutional Construction*, 19 OKLA. CITY U.L. REV. 213, 222-24 (1994) (draft opinions, conference notes, and letters in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)); Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 237 (Justice Fortas' draft opinion in Brandenburg v. Ohio, 395 U.S. 444 (1969)); Bernard Schwartz, *Justice Brennan and the* Brandenburg *Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 27-28 (July-Aug., 1995); Bernard Schwartz, *An Administrative Law "Might Have Been"-Chief Justice Burger's* Bowsher v. Synar *Draft*, 42 ADMIN. L. REV. 221 (1990); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245; Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317; Bernard Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115. For other Schwartz publications, see, for example, NORMAN REDLICH, BERNARD SCHWARTZ & JOHN ATTANASIO, UNDERSTANDING CONSTITUTIONAL LAW (1995); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993); BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT (1993); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS (expan. ed. 1992) (1977); BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK (1990); BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877 (1973); BERNARD SCHWARTZ, A BASIC HISTORY OF THE U.S. SUPREME COURT (1968); BERNARD SCHWARTZ, THE REINS OF POWER: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1963); BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957); 1-5 THE ROOTS OF THE BILL OF RIGHTS; AN ILLUSTRATED SOURCE BOOK OF AMERICAN HISTORY (Bernard Schwartz, ed., 1980) (reprinting 1-2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (Bernard Schwartz ed. 1971)); 1-2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (Bernard Schwartz ed. 1970); 1-5 A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Bernard Schwartz ed. 1963-1968); Bernard Schwartz, *Hugo L. Black* and *Earl Warren* in THE WARREN COURT: A TWENTY-FIVE YEAR RETROSPECTIVE, 195-203, 256-75 (Bernard Schwartz ed., 1996); Bernard Schwartz, *"Warren Court"—An Opinion*, in THE SUPREME COURT UNDER EARL WARREN 48-54 (Leonard Levy ed., 1972); Bernard Schwartz, *The Amendment in Operation*, in

As a result, stark consequences ensue. First, for example, debates concerning the proprieties—ethical, moral, and legal—of exposing to public scrutiny internal Supreme Court activities may not be necessary.[7]

Written[8] and oral[9] information exposing "life" inside the

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THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 29-38 (1970); Bernard Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L.J. 521 (1996); Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93 (1995); Bernard Schwartz, *Bias in* Webster *and Bias in Administrative Law*, 30 TULSA L.J. 461 (1995); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417 (1994); Bernard Schwartz, *Death TV? Is There a Press Right of Access to News that Allows Television of Executions?* 30 TULSA L.J. 305 (1994); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587 (1990); Bernard Schwartz, *National League of Cities Again: R.I.P. or a Ghost that Still Walks?*, 54 FORDHAM L. REV. 141 (1985); Bernard Schwartz, *Earl Warren as a Judge*, 12 HASTINGS CONST. L.Q. 179 (1985); Bernard Schwartz, *Chief Justice Warren and 1984*, 35 HASTINGS L.J. 975 (1984); Bernard Schwartz, National League of Cities v. Usery *Revisited—Is the Quondam Constitutional Mountain Turning Out to Be Only a Judicial Molehill?*, 52 FORDHAM L. REV. 329 (1983); Bernard Schwartz, *The Judicial Lives of Earl Warren*, 15 SUFFOLK U. L. REV. 1 (1981).

[7] In addition to earlier discussions, see *supra* note 3, reviews of Schwartz's books, *see supra* note 6, have regenerated this debate. *See, e.g.* Daniel O. Conkle, Book Review, 6 CONST. COMM. 533 (1989); Robert J. Glennon, Book Review, 72 A.B.A. J. 108 (Jan. 1986); Anthony Lewis, *The Arguments Mattered Most*, N.Y. TIMES BOOK REV., Dec. 29, 1985, at 20; David O'Brien, Book Review, 4 CONST. COMM. 212 (1987); Timothy J. O'Neil, Book Review, 505 ANNALS 180 (1989); D. Grier Stephenson, Jr., *The Judicial Bookshelf*, 1987 Y.B. SUP. CT. HISTO. SOC'Y. 108, 112-14; James A. Thomson, *Conflict Among the Brethren*, 1 PUB. L. REV. 100 (1990); James A. Thomson, Book Review, 22 HARV. C.R.-C.L.L. REV. 290 (1987). Similarly reviews of SCHWARTZ, SUPER CHIEF, *supra* note 6 enlivened this debate. *See, e.g.*, Ruggero J. Aldisert, Book Review, 72 CAL. L. REV. 275 (1984); Edward L. Barrett, Jr., Book Review, 17 U.C. DAVIS L. REV. 413 (1983); Eugene Gressman, Book Review, 52 FORDHAM L. REV. 711 (1984); Erwin N. Griswold, Book Review, 69 A.B.A. J. 1506 (1983); Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922 (1983); Thomas P. Lewis, Book Review, 1 CONST. COMM. 334 (1984); Paul L. Murphy, Book Review, 52 GEO. WASH. L. REV. 488 (1984); Kenneth Starr, Book Review, 49 MO. L. REV. 423 (1984); D. Grier Stephenson, Jr. *Lifting the Veil: A Look Inside the Warren Court: A Review Essay*, 55 U. COLO. L. REV. 445 (1984). For Professor Schwartz's justification for intruding into the Supreme Court's internal domain see SCHWARTZ, *supra* note 1, at viii-xii; SCHWARTZ, *supra* note 2, at 3-5, 25-26; SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT, *supra* note 6, at 22-27. For reviews of SCHWARTZ, *supra* note 1, see, for example, Marcia Coyle, *Case Studies*, N.Y. TIMES BOOK REV. May 5, 1996 at 24.

[8] *See supra* notes 3, 5, 6, 7, *infra* notes 12, 22.

Supreme Court continues, at an exponential rate, to be thrust into public purview.[10] Indeed, this is not confined to events[11]

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[9] In addition to interviews and conversations see, for example, FELIX FRANKFURTER REMINISCES (recorded in talks with Harlan B. Phillips, 1960) (Columbia University Oral History Research Collection); Amelia R. Fry, *The Warren Tapes: Oral History and the Supreme Court*, 1982 Y.B. SUP. CT. HIST. SOC'Y 10; Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299; G. Edward White, *Researching Oral History Materials: The Case of Earl Warren*, 75 L. LIBR. J. 355 (1982); Howard Kurtz, *Marshall Had Harsh Words About Eisenhower*, RKF, WASH. POST. Jan. 31, 1993, at A10 ("Transcripts of [Justice Marshall's] interviews recorded in 1977 by the Columbia University's Oral History Project").

[10] *See supra* note 8. Of course, such information is integrated into scholarly descriptions and analyses of the Supreme Court. *See, e.g.*, PHILLIP COOPER & HOWARD BALL, THE UNITED STATES SUPREME COURT: FROM THE INSIDE OUT 100-279, 312-33 (1996); MURPHY, *supra* note 5; DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 57-63, 118-210 (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 165-298 (1993); O'BRIEN, *supra* note 4. Also, Justices' publications provide such information. *See, e.g.*, WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1980); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 301-02 (David J. Danelsk & Joseph S. Tulchin ed., 1973); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987); EARL WARREN, THE MEMOIRS OF EARL WARREN 275-320 (1977); William H. Rehnquist, *The Supreme Court's Conference*, in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS, 75-78 (Mark W. Cannon & David M. O'Brien ed., 1985); William J. Brennan, *State Court Decisions and the Supreme Court*, 34 FLA. B.J. 269 (1960); Tom C. Clark, *The Supreme Court Conference*, in 19 FEDERAL RULES DECISIONS 303-10 (1956) (reprinted in the SUPREME COURT: VIEWS FROM INSIDE, 45-50 (Alan Westin ed. 1961); Tom C. Clark, *Internal Operations of the United States Supreme Court,* 43 AM. JUDICATURE SOC'Y J. 51 (1959); Mason, *supra* note 3, at 299 (quoting Charles E. Hughes); Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, 66 A.B.A. J. 721 (1980) (reprinted in Canon & O'Brien, *supra*, at 71-74); William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559 (1977) (Conference of the Supreme Court).

[11] For example, Justices Black and Jackson's feud. *See*, for example, ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 321-22, 333-37, 341-48 (1994); Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203. For other imbroglios and machinations, see, for example, James A. Thomson, *Mirages of Certitude: Justices Black and Douglas and Constitutional Law*, 19 OHIO N.U. L. REV. 67, 74-75 (1992); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71. *See also infra* note 105 (providing additional examples).

or cases[12] of prior decades.[13] Supreme Court "secrets" are re-

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[12] Perhaps, the best example of "internal exposure" is information revealed about the decision making process in Brown v. Board of Education, 347 U.S. 483 (1954). Briefs and oral arguments are, for example, published in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF TOPEKA, 1952-55 (Leon Friedman ed., 1969, rep. 1983); 49 & 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975); REMOVING A BADGE OF SLAVERY: THE RECORD OF *BROWN V. BOARD OF EDUCATION* (Mark Whitman ed. 1993). General publications containing internal revelations include DANIEL BERMAN, IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL SEGREGATION (1956); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); SCHWARTZ, *supra* note 1, at 95-104; MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); Philip Elman, *The Solicitor General's Office, Justice Frankfurter and Civil Rights Litigation*, 1946-1960, 100 HARV. L. REV. 817 (1987); Philip Elman, *Response*, 100 HARV. L. REV. 1949 (1987); John D. Fassett, *Mr. Justice Reed and* Brown v. The Board of Education, 1986 Y.B. SUP. CT. HIST. SOC'Y 48; Jeffrey D. Hockett, *Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action*, 1989 Y.B. SUP. CT. HIST. SOC'Y 52; Hutchinson, *supra* note 4, at 30-60; Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987); Michael Stokes Paulsen & Daniel N. Rosen, Brown, Casey-*Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994); Schwartz, *Chief Justice Rehnquist*, *supra* note 6; Stephenson, *supra* note 7, at 459-62; Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689 (1971). Also, judicial biographies of Justices deciding *Brown* provide internal insights. *See, e.g.,* NEWMAN, *supra* note 11, at 426-40,689-90; SCHWARTZ, SUPER CHIEF, *supra* note 6, at 72-127, 782-87; MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND CIVIL LIBERTIES, 134-43, 212-14 (1991); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE, 161-72, 399-401 (1982). There is information available from other participants. *See, e.g.*, HERBERT BROWNWELL, ADVISING IKE: THE MEMOIRS OF ATTORNEY-GENERAL HERBERT BROWNWELL, 189-97 (1993); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 155-206, 545-50 (1994); PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN *BROWN V. BOARD OF EDUCATION* (1995); Herbert Brownell, Brown v. Board of Education: *Revisited*, 1993 J. SUP. CT. HIST. 21; Victor H. Kramer, *President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases: Minding the Whys and Wherefores*, 9 CONST. COMM. 223 (1992); Sydnor Thompson; *John W. Davis and His Role in the Public School Segregation Cases—A Personal Memoir*, 52 WASH. & LEE L. REV. 1679 (1995). *See also infra* notes 34 (discussing people in *Brown*), 76 (discussing oral argument in *Brown*).

[13] It has been suggested that "[a]fter a certain lapse of time—opinions vary as to how long that should be—the Court and the country would gain from informed and responsible disclosures of its internal proceedings." Mason, *supra* note 3, at

vealed virtually contemporaneously with the publication of the Justices' official opinions and decisions.[14] The *Unpublished Opinions of the Rehnquist Court* exemplifies this genre.[15]

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723. Several authors provide discussions of this contemporaneous issue. *See, e.g.*, Paul Bender, Book Review, 128 U. PA. L. REV. 716, 722 (1980) (reviewing THE BRETHREN, *supra* note 3) ("after some years have elapsed"); Stephenson, *Lifting the Veil*, *supra* note 7, at 455-56 (disclosure of internal information "by or about" current or "recently retired" Justices raises "questions of propriety"). Indeed, this concern caused Justice Brennan "to modify his [disclosure] practice" and to "refuse[] requests for access to his files on cases decided since Chief Justice Rehnquist has headed the Court." SCHWARTZ, *supra* note 1, at ix. *See also* SCHWARTZ, *supra* note 2, at 3-4 (partially reproducing Justice Brennan's Dec. 19, 1990 Memorandum to the Conference).

[14] Four examples provide illustrations. First, "[f]ifteen years . . . separate the decision in [Swann v. Charlotte-Macklenburg Board of Education, 402 U.S. 1 (1971)] and publication of [SWANN'S WAY, *supra* note 6]." Stephenson, *Judicial Bookshelf*, *supra* note 7 at 113. Secondly, MASON, *supra* note 1, was published "just eleven years after [Chief Justice] Stone's death . . . [while] several members of the *Stone* Court were . . . still sitting . . . [a]nd parts of [MASON, *supra* note 1] had already been published . . . in law reviews." *Id.* Thirdly, THE BRETHREN, *supra* note 3, "an account of the inner workings of the Supreme Court from 1969 to 1976," *id.* at 2, was published in 1979. Fourthly, SCHWARTZ, *supra* note 2, reproducing internal court papers on cases decided between 1987 and 1991, was published in 1996. For different views about the consequences, for example, chilling or inhibiting Justices' conference discussions *see* SCHWARTZ, *supra* note 1 at x-xii. *See also infra* note 15 (discussing removal of papers and denial of access).

[15] *See supra* note 14. However, SCHWARTZ, *supra* note 1, "may . . . be the last of its kind—for some time at least." *Id.* at ix. The reasons include restrictions on access to post-1986 Brennan papers (*see supra* note 13) and current Justices' removal of material from their files and "opposition" to releasing internal papers. *Id.* at ix-x. "Most of the published revelations on what goes on during the Justices' deliberative processes have been based upon materials obtained from the Brennan files." However, "[t]he material . . . disclosed [in SCHWARTZ, *supra* note 1] was obtained from the Thurgood Marshall papers in the Library of Congress . . . ." *Id.* at ix. For other contemporaneous usage of Justice Marshall's papers, *see, e.g.*, SCHWARTZ, *supra* note 2; Schwartz, *Justice Brennan*, *supra* note 6; Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-91: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473 (1995); Joan Biskupic, *The Marshall Files* (pts. 1, 2, & 3), WASH. POST, May 23, 1993; May 24, 1993, at A1, A10; May 25, 1993, at A1, A6. For the controversy over access to Marshall's papers, *see, e.g.* Stanley I. Kutler, *Misinformed Protests Over the Papers of Justice Marshall*, CHRON. HIGHER EDUC., June 16, 1993, at B1; Note, *A Court's Deliberations Revealed*, 79 A.B.A. J. 26 (Aug. 1993); Benjamin Weiser & Joan Biskupic, *Marshall Lawyer Tries to Close Acceess to Papers*, May 25, 1993, at A1, A6; David J. Garrow, *There's Noting to Fear in Those Papers*, WASH. POST, May 27, 1993 at A25; Benjamin Weiser, *Librarian Rejects Restrictions, id* at A1,

Therefore, a second consequence is rendered even more important.

Having read, analyzed, and interpreted published opinions and per curiams,[16] a similar process will have to be undertaken with draft opinions, memorandums, conference notes, and letters. This must be done not only for scholarly interest or curiosity—ascertaining how the Justices reached or formulated their published opinions and decisions—but also for the elucidation such internal information might provide of those opinions and decisions. That is, are draft opinions an interpretative device?[17] If it assists in understanding or clarification of Justice Holmes'[18] official published opinions,[19] to examine his draft opinions[20] and, if this also applies to other deceased Justices, for example Brandeis[21] and Stone,[22] an

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A21; *The Marshall Files: The Complaints and the Library's Response, id.* at A20. *See also infra* note 122 (suggesting that Marshall papers contain "nearly all of the Court's internal documents" during 1967-1991).

[16] *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 (1985); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 (1990).

[17] For a negative response *see* Tushnet, *supra* note 6, at 545 (suggesting that although internal court papers "may contribute to an emerging picture of the modern Supreme Court as bureaucratic rather than collegial, and perhaps may help modify our understanding of the Court's operation [they ought not] . . . change our understanding of constitutional law"). Similar discussions also emerge from judicial biographies. *See, e.g.*, James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910*, 27 CUMB. L. REV. 139, 156 n.89 (1996).

[18] *See, e.g.*, G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993); James A. Thomson, *Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law* (Review Essay) 22 RUTGERS L.J. 123 (1990).

[19] *See* Thomson, *supra* note 18, at 127-28 nn.17-18 (Holmes' Massachusetts Supreme Court and United States Supreme Court opinions).

[20] *See, e.g.*, Joseph F. DiMento, *Mining the Archives of* Pennsylvania Coal*: Heaps of Constitutional Mischief*, 11 J. LEG. HIST. 396, 433-36 (1990) (draft of Holmes' and Brandeis' opinions in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)); Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 331-32 (Holmes' draft opinion in Baltzer v. United States, 248 U.S. 593 (1918)). *See also* Bickel, *supra* note 5, at 235-36 (reproducing extracts from Holmes' memorandum and draft opinion concerning Bullock v. Florida, 254 U.S. 513 (1921)).

[21] *See, e.g.*, BICKEL, *supra* note 5; Clyde Spillenger, *Reading the Judicial Can-*

affirmative response may be inevitable to the obvious question: can internal Supreme Court information help in clarifying and predicting a sitting Justice's opinion and vote in past, pending and future litigation?

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on: Alexander Bickel and the Book of Brandeis, 97 J. AM. HIST. 125 (1992); Paul A. Freund, *Mr. Justice Brandeis*, *in* MR. JUSTICE: BIOGRAPHICAL STUDIES OF TWELVE SUPREME COURT JUSTICES 177, 196-97 (Allison Dunhamam & Philip B. Kurland eds., rev. ed. 1964) (extract from Brandeis' draft opinion in Olmstead v. United States, 277 U.S. 438 (1928)) (reprinted in Paul A. Freund, *The Evolution of a Brandeis Dissent*, MANUSCRIPTS 18 (Spring 1958)).

[22] In addition to MASON, *supra* note 1 and commentary in *supra* note 3, see, for example, LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 119-32, 177-90 (1993) (explanation and drafts of footnote 4 in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982). For other published draft opinions see, for example, ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991) (App. 1) ("First Draft of Justice Brennan's Opinion in New York Times Co. v. Sullivan," 376 U.S. 254 (1964)); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 69-70 (1986) (Chief Justice Stone's draft concurring opinion in Korematsu v. United States, 323 U.S. 214 (1944)); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 525-30 (1986) (Justice Patterson's draft opinion) (partially reprinted *in* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 136 (1995)); Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZA L. REV. 235, 246-47, 252-58 (1988) (extracts of Cardozo's handwritten opinions in Nixon v. Condon, 286 U.S. 73 (1932) and United States v. Swift & Co., 286 U.S. 106 (1932)); Anthony Lewis, *Justice Black and the First Amendment*, 38 ALA. L. REV. 289, 291-92, 295 (1987) (extracts of Justices Frankfurter's and Black's draft opinions in Bridges v. California, 314 U.S. 252 (1941)); Thomas M. Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 CONST. COMM. 331, 340-45 (1989) (extracts from Clark's draft opinions in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963)); Arthur S. Miller & Jeffrey H. Bowman, *"Slow Dance on the Killing Ground": The* Willie Francis *Case Revisited*, 32 DEPAUL L. REV. 1, 51-70 (1983) (draft opinions in Louisiana ex rel Francis v. Resweber, 329 U.S. 459 (1947)) (discussed in ARTHUR S. MILLER & JEFFREY H. BOWMAN, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS 75-89 (1988)). *See also* David M. O'Brien, *John Marshall Harlan's Unpublished Opinions: Reflections of a Supreme Court at Work* 1991 J. SUP. CT. HIST. 27 (partially reprinted in O'BRIEN, *supra* note 4, at 311, 325-27, 443 n.91, 445 n.136).

II. INSIDE THE SUPREME COURT

Being at[23] or in[24] the Supreme Court is, of course, not the complete story.[25] Getting there—because most cases are appealed to the Supreme Court[26]— is also important. Obvious reasons for and benefits from revealing and understanding what occurred before Supreme Court proceedings commenced include placement of Supreme Court cases within a wider historical panorama and, within that context, the opportunity for a more reflective assessment of the Justices' decisions and opinions. Other than from Supreme Court papers, *The Unpublished Opinions of the Rehnquist Court* does not elaborate[27] these broader dimensions.[28] To do so requires much more[29]

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[23] *See, e.g.*, text accompanying *infra* notes 67-79 (examining oral argument and briefs of the Supreme Court).

[24] *See, e.g.*, text accompanying *infra* notes 80-116 (discussing "Inside" the Supreme Court).

[25] For debates concerning "the law as narrative" concept see, for example, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jane E. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 37-53, 242-47 (Peter Brooks & Paul Gewirtz eds., 1996); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).

[26] *See* U.S. CONST. art. III, § 2, cl. 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction [and] [i]n all the other cases . . . the Supreme Court shall have appellate Jurisdiction"). *See generally* O'BRIEN, *supra* note 4, at 189-201 ("Managing the Caseload" including a chronological list of 1789-1988 congressional legislation affecting the Supreme Court's jurisdiction); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 25-40 (1991) (original jurisdiction, appeals and certiorari). "[V]irtually all of the Court's nondiscretionary appellate jurisdiction" has been eliminated. "The only mandatory appeals . . . are those that involve reapportionment, some antitrust matters, and cases under the Civil Rights and Voting Rights Act and the Presidential Election Campaign Fund Act." O'BRIEN, *supra* note 4, at 192, 195 (footnote omitted).

[27] Occasionally, some background information is provided in Professor Schwartz's introduction to each chapter. *See, e.g.* SCHWARTZ, *supra* note 2, at 30-31. However, usually that information can be ascertained from the court's papers.

[28] Professor Schwartz's articulated objective is to reveal and, therefore, under-

than Professor Schwartz's publications provide.[30]

Some indication of the extensive investigative parameters and, consequently, what can be achieved is provided by scholarship focusing on individual cases.[31] Here, the Supreme Court, including its internal activities, may be only one, albeit an important, aspect of much larger narratives.[32] Indeed, even where a great deal of such information has been collected, considered, and published[33] more may remain to be done.[34] Of course, this does not diminish the value of publish-

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stand the Supreme Court's decision-making process. *See, e.g.,* SCHWARTZ, *supra* note 1, at vii-xii (discussing "Supreme Court's decision process"); SCHWARTZ, *supra* note 2, at 3-5, 25-26 (stating that Schwartz's "primary purpose in [his publications, *supra* note 6,] is to show how the highest court operates").

[29] *See infra* notes 31-34.

[30] *See supra* note 6.

[31] *See, e.g.,* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983); BARBARA H. CRAIG, CHADA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE (1988), DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994); PETER IRONS, JUSTICE AT WAR (1983); KLUGER, *supra* note 12; LEWIS, *supra* note 22; MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977); DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE (1966); MELVIN I. UROFSKY, A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION (1991).

[32] The same sentiment pervades a similar context:

> A judicial biographer needs . . . to look up from the law books to inquire: Out of what social conflict did this litigation arise? What was the ultimate objective in view? Questions such as these should be pursued into out-of-the-way places . . . . One is the records of the corporations interested in the litigation. The reports of committees, the opinion of counsel, the votes of directors, may disclose the strategy of some campaign of which this lawsuit was a skirmish or perhaps a decisive battle. Another . . . source is . . . the letter-books, briefs, and other office papers of law firms prominent in the conduct of major litigation.

Charles Fairman, *The Writing of Judicial Biography—A Symposium*, 24 IND. L.J. 363, 366 (1949).

[33] *See, e.g., supra* note 12 (listing publications about Brown v. Board of Educ., 347 U.S. 483 (1954)).

[34] *See, e.g.,* Tushnet & Lezin, *supra* note 6, at 1867 n.3 (stating that "[a] complete account of what really happened in *Brown* would [in addition to focusing on the deliberative process in the Supreme Court] also examine the roles of people such as Linda Brown, Joseph DeLaine (a school teacher and minister who organized the plaintiffs in the South Carolina case decided with *Brown*), Thurgood Marshall, and . . . Barbara Johns (a high school student who organized a student

ing internal Supreme Court papers. Rather, it puts into perspective and assists in evaluating the usefulness of publications such as *The Unpublished Opinions of the Rehnquist Court*.

III. ENTRY INTO THE COURT

Petitioning the Supreme Court for a writ of *certiorari* or lodging an appeal[35] begins the process of entering the Supreme Court. Following lodgment of respondents' reply briefs, the Justices' internal deliberations begin.[36] Decisions as to whether to hear an appeal or grant *certiorari* and, therefore, to schedule oral arguments and request written briefs on the cases' merits[37] are made[38] in the Justices' conference

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strike to protest the conditions at her segregated school in Virginia, and who called the lawyers in for help)"). An example is PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT (new ed. 1990).

[35] *See supra* note 26 (distinguishing discretionary and mandatory appellate jurisdiction). *See generally* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (7th ed., 1993) (comprehensive treatment of Supreme Court's jurisdiction and rules). *See also* E. Barrett Prettyman, Jr., *Petitioning the United States Supreme Court—A Primer for Hopeful Neophytes*, 51 VA. L. REV. 582 (1965) (discussing petitions to the U.S. Supreme Court).

[36] For a comprehensive discussion of the formal rules and practices, internal court documents (*e.g.*, Miscellaneous Docket, Appellate Docket, Justices' docket books), conference discussions, the rule of four, the substantive aspects and possible consequences (e.g., this selection process as an initial merits battleground), and significance of denying *certiorari* see O'BRIEN, *supra* note 4, at 226-56, 259-71. *See also* DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 979-1045 (1994) ("Certiorari Policies, Practices, and Problems"); Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U.L. REV. 611, 621-22 (1984). On cases decided "without full consideration" see O'BRIEN *supra* note 4, at 256-59 and for cases where the writ of *certiorari* was dismissed (after full consideration) as improvidently granted *see* SCHWARTZ, *supra* note 2, at 30-64 (Missouri v. Blair, 480 U.S. 698 (1987)); 105-134 (California v. Rooney, 483 U.S. 307 (1987)). *See generally* Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143 (discussing Justice Frankfurter's intra-mural "efforts to improve the [Supreme] Court's internal practices and procedures").

[37] *But see supra* note 36 (some cases decided without oral argument and briefs on the merits).

[38] For preparatory work done on appeal applications and *certiorari* petitions, especially by law clerks and the "*cert* pool," see O'BRIEN, *supra* note 4, at 234-37

room.[39] Such decisions can be crucial.[40] Apart from their procedural dimension indicating what cases the Supreme Court will decide, these decisions may be influenced by the merits—substantive and constitutional—of a contentious or controversial issue.[41]

The *Unpublished Opinions of the Rehnquist Court* does not concentrate on these aspects of the Supreme Court's internal decision-making processes. Only on two[42] occasions are they highlighted. First, in *Patterson v. McLean Credit Un-*

(especially noting that "[t]he expanded role of law clerks in screening cases is significant and problematic").

[39] There are two conferences where only the Justices meet. First, the "conference to decide which cases to accept" or decide. Secondly, post-argument conferences "to discuss the merits of those few cases on which [Justices] hear oral arguments." *Id.* at 237-38. For descriptions of these conferences see *id.* at 238-45 (initial screening conference), 293-302 ("Conference on the Merits"); *supra* note 10 (references).

> [T]he conference room [is] located directly behind the courtroom . . . and next to the chief justice's chambers. The oak-paneled room is lined with United States Reports . . . . Over the mantel of an exquisite fireplace . . . [is] a portrait of Chief Justice Marshall. Next to the fireplace stands a large rectangular table, where the Justices sit. The chief justice sits at the one end and the senior associate justice at the other . . . . The seating of the Justices has traditionally been on the basis of seniority. But variations occur because of individual Justices' preferences.

O'BRIEN, *supra* note 4, at 238. *See also* SCHWARTZ, *supra* note 2, at 20-21 (similar). For photographs see *supra* notes 2, 4. There are other conference rooms in the Supreme Court building. *See supra* notes 2, 4; O'BRIEN, *supra* note 4, at 155 ("The main floor holds two large conference rooms").

[40] For example, "only four justices voted to hear [Baker v. Carr, 369 U.S. 186 (1962)]." SCHWARTZ, *supra* note 2, at 17.

[41] For the suggestions that "[t]he selection process may appear as 'the first battleground on the merits'" and "[t]hat justices pass on the merits when screening cases is inescapable in view of the growing number of dissents and dissenting opinions from the denial of *certiorari*", see O'BRIEN. *supra* note 4, at 249, 252. Of course, because of the informal "rule of four" (which requires at least four justices to agree that an appeal be taken or *certiorari* be granted before a case is entered for oral argument and full consideration, see generally *id.* at 246-56) "it would generally be unwise for [Justices] to vote to grant *certiorari* in cases on which they will be outvoted on the merits" by at least five justices. MURPHY, *supra* note 5, at 80. Even so, some Justices vote to grant *certiorari*, O'BRIEN, *supra* note 4, at 251-56 (explanations and examples of this phenomenon).

[42] *But see* SCHWARTZ, *supra* note 2, at 17 (discussing decisions as to whether to take appeals and grant *certiorari* and the rule of four).

ion:[43]

> [The District Court and Court of Appeals for the Fourth Circuit] ruled in favor of [the] respondent. Certiorari was granted by an eight-Justice Court, with Justices Brennan, White, Marshall, and Stevens voting to grant, and the Chief Justice [Rehnquist] and Justices Blackmun, O'Connor, and Scalia to deny.[44]

Unfortunately, Professor Schwartz does not allude to all of the events in *Patterson*. Preliminary examples include: What was the date of the *Patterson certiorari* vote? Do the Justices' docket books provide details about what, if any, conference discussions occurred? Were there any pre- or post-conference negotiations concerning this vote? Subsequently, Justice Kennedy was appointed on February 18, 1988.[45] Initially, *Patterson* was argued on February 29, 1988.[46] *The Unpub-*

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[43] 491 U.S. 164 (1989)(affirming that section 1 of the 1866 Civil Rights Act (now 42 U.S.C. § 1981) reached private conduct in prohibiting racial discrimination in making and enforcing private contracts, discussing the relationship between § 1981 and Title VII of the Civil Rights Act of 1964; expressly declining to overrule Runyon v. McCrary, 427 U.S. 160 (1976); and holding petitioner's racial harassment claim relating to conditions of employment was not actionable under § 1981). *See generally* SCHWARTZ, *supra* note 1, at 240-46. Simon, *supra* note 1, at 19-81, 309-12; Caroline R. Fredrickson, *The Misreading of* Patterson v. McLean Credit Union: *The Diminishing Scope of Section 1981*, 91 COLUM. L. REV. 891 (1991); Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1; Allan H. Macurdy, *Classical Nostalgia: Racism, Contract Ideology, and Formalist Legal Reasoning in* Patterson v. McLean Credit Union, 18 N.Y.U. REV. L. & SOC. CHANGE 987 (1991); Schwartz, *Rehnquist*, Runyon, *supra* note 6; Symposium, Patterson v. McLean, 87 MICH. L. REV. 1 (1988); Note, *Section 1981-Racial Harassment and Discrimination in the Workplace,* 103 HARV. L. REV. 330 (1989); *see also* Mark Tushnet, Patterson *and the Politics of the Judicial Process*, 1988 SUP. CT. REV. 43, (discussing Supreme Court's request that litigants re-argue the Runyon interpretation of § 1981); *Symposium on the Reconsideration of* Runyon v. McCrary, 67 WASH. U.L.Q. 1 (1989).

[44] SCHWARTZ, *supra* note 2, at 201. The eight Justice Court was a result of Justice Powell's resignation effective from June 26, 1987.

[45] THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995 at 519 (Clare Cushman ed., 2d ed. 1995). Justice Kennedy was nominated by President Reagan Nov. 30, 1987; confirmed by the Senate Feb. 3, 1988; took the judicial oath Feb. 18, 1988. *Id.*

[46] Patterson v. McLean Credit Union, 491 U.S. 164, 164 (1989). "*Patterson* was argued on the fourth argument day of Justice Kennedy's tenure." Tushnet, *supra*

lished Opinions of the Rehnquist Court does not reveal what, if any, post-argument conference discussions or decisions occurred.[47] Subsequently, re-argument was ordered[48] and held on October 12, 1988.[49] But, what internal discussions preceded that order? Why was it made?[50] Did internal voting correspond with the appearance conveyed by the Court's published order and dissents?[51]

Professor Schwartz merely discloses that "the [post-re-argument] conference on October 14, 1988 voted by a bare

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note 43, at 51 n.25; *see also* SIMON, *supra* note 1, at 24-27 (extracts from and analysis of oral argument).

[47] Partially published is correspondence on Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (42 U.S.C. § 1981 litigation). SCHWARTZ, *supra* note 2, at 198-99 (Rehnquist to White, April 7, 1987; Powell to White, April 9, 1987; Blackmun to White, April 13, 1987). *See also* SCHWARTZ, *supra* note 1, at 239 (same); Schwartz, *Rehnquist*, Runyon, *supra* note 6, at 257, 267 (same). *Compare* SIMON, *supra* note 1, at 28-31 (extracts from and analysis of March 2, 1988 post-argument conference discussions and decisions in *Patterson*).

[48] Patterson v. McLean Credit Union, 485 U.S. 617 (1988). Justices Blackmun and Stevens' published dissents. *Id.* at 619-23 (both dissents joined by Justices Brennan and Marshall). For a discussion, *see* Tushnet, *supra* note 43.

[49] 491 U.S. 164 (1989).

[50] Two possibilities exist. First, by the time "the motion was made in *Patterson* . . . to order re-argument . . . Chief Justice Rehnquist and Justices White . . . Blackmun, Stevens and O'Connor had indicated . . . reservations about . . . *Runyon* and *Jones.*" Schwartz, *Rehnquist,* Runyon, *supra* note 6, at 267-68. See also *supra* note 47 (correspondence). However, this "reservations" reason is not so overtly repeated in SCHWARTZ, *supra* note 1, at 238-39, or SCHWARTZ, *supra* note 2, at 267-68. Secondly, see, for example, Tushnet, *supra* note 43, at 58-59 (suggesting as one possibility that, in the "political context" of the Senate's rejection of President Reagan's nomination of Robert Bork to fill the vacancy caused by Justice Powell's resignation and possible belief of Bork's opponents that this "defeat ratified their view of the Constitution and the Supreme Court as the activist defender of civil rights with a continuing commitment to the [Warren Court's] landmarks," "the *Patterson* order sent a signal that . . . [Bork's defeat] had not permanently altered the landscape" and "dispelled any illusions the civil rights community might have had about its relation to the contemporary Supreme Court") (footnote omitted). On the Bork nomination, *see infra* note 58. *See* SIMON, *supra* note 1, at 28-31 (post-argument conference discussions on March 2, 1988 concerning *Patterson* re-argument), 37-40 (drafting of re-argument opinions and order).

[51] *See supra* note 48. For an affirmative response, see SIMON, *supra* note 1, at 28-31, 37-40. *Compare* GARROW, *supra* note 31, at 552-56 (internal discussions and memoranda concerning the reargument order in Roe v. Wade, 404 U.S. 919 (1972)); WOODWARD & ARMSTRONG, *supra* note 3, at 186-89 (similar).

majority to reverse (Justices Brennan, Marshall, Blackmun, and Stevens, were joined by Kennedy, who was only appointed after the cert vote)."[52] That alignment enabled Justice Brennan, the senior associate Justice in the majority, to "assign[] the [*Patterson*] opinion to himself."[53] However, on April 17, 1989, "Justice Kennedy . . . changed his conference vote on the case."[54] That switch, perhaps attributable to Justice White's draft dissent,[55] enabled Justice Kennedy, not Justice Brennan, to deliver the Court's opinion and, therefore, to shift the statutory interpretation and, consequently, the result from upholding to dismissing Brenda Patterson's racial harassment claim.[56] "Thus, [as *The Unpublished Opinions of the Rehnquist Court* concludes] *Patterson* came down as a victory for the more restricted Rehnquist interpretation of the [1866] civil rights statute."[57] Given the equal *certiorari* vote and contemporaneous nomination politics,[58] what lessons can be extrapolated

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[52] SCHWARTZ, *supra* note 2, at 201. *See also* SIMON, *supra* note 1, at 46-49 (extracts from and analysis of October 14, 1988 post-argument conference).

[53] SCHWARTZ, *supra* note 2, at 201. *See also* SCHWARTZ, *supra* note 2, at 203-36 (Justice Brennan's draft opinion for the Court).

[54] *Id.* at 257.

[55] *Id.* at 237-44 (reproducing Justice White's Jan. 12, 1989 draft opinion), 256-57 (commentary on that draft).

[56] *See supra* note 43.

[57] SCHWARTZ, *supra* note 2, at 259. Professor Schwartz appears to have resiled in 1996 from his more optimistic 1995 view because *id.* and SCHWARTZ, *supra* note 1, at 246 omit "But *Patterson* was more important as a defeat for the continuing Rehnquist effort to have *Runyon* and *Jones* overruled . . . . Correctly decided or not, *Jones* and *Runyon* remain as pillars of [1995] civil-rights jurisprudence." Schwartz, *Rehnquist*, Runyon, *supra* note 6, at 272-73. Two reasons may motivate Schwartz's change. First, the possibility that Justice Brennan made a "strategic" error. *See infra* note 59. Secondly, the possibility that Chief Justice Rehnquist has or might have "renewed his effort" to overrule *Jones* and *Runyon* which in 1995 Schwartz thought Rehnquist had abandoned. Schwartz, *Rehnquist*, Runyon, *supra* note 6, at 273.

[58] On President Reagan's nomination and the Senate's rejection of Robert Bork see, for example, ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); COOPER & BALL, *supra* note 10, at 32-43; MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990); Symposium, *Confirmation Controversy: The Selection of a Supreme Court Justice*, 84 NW. U.L. REV. 832-1046 (1990).

from internal deliberations? Are *certiorari* votes crucial? Should Justices, despite wanting to grant *certiorari*, vote against doing so when it is uncertain or unclear whether they can garner five votes for their preferred position on a case's ultimate disposition? If, for example, that had occurred with Justice Brennan's *Patterson* vote on *certiorari*, "exactly the opposite" doctrine may have eventually prevailed.[59] Despite being defeated on the grant of *certiorari*, did Chief Justice Rehnquist achieve his objective[60] by delaying, via re-argument, the decision and directly or indirectly, through Justice White, persuading Justice Kennedy to change his vote?

Possibly even more innocuous is a second reference in *The Unpublished Opinions of the Rehnquist Court*, to the *certiorari* process.

> [The United States District Court for the Western District of Missouri and the Court of Appeals for the Eighth Circuit] had ruled that . . . provisions [in a Missouri law regulating abortions] violated the [Supreme] Court's decisions in *Roe v. Wade* and subsequent cases. The Justices who supported the right to abortion feared that, under the new Chief Justice [Rehnquist], the majority would use this case to strike at the *Roe* decision. "Taking this case," a December 29, 1988 memo on *Webster* to Justice Marshall by his law clerk warned, "would pose a great threat that the majority on this Court would overrule or dramatically limit, Roe." Despite this, the Court voted on January 9, 1989 to take the case, with Justices Brennan, Marshall, and Blackmun voting the other way.[61]

Again, Professor Schwartz provides no indication of what, if

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[59] At least from a Brennan perspective, that would have been preferable to having as the law Rehnquist's Patterson (*see* text accompanying *supra* note 57) and only being left to opine (with Professor Schwartz) about what might have been—"exactly the opposite" doctrine—if the votes had been different. SCHWARTZ, *supra* note 2, at 259. *See supra* note 41 (voting on *certiorari*).

[60] *But see* SCHWARTZ, *supra* note 2, at 198, 200 (Chief Justice Rehnquist's ultimate objective to overrule Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and Runyon v. McCrary, 427 U.S. 160 (1976) not achieved in *Patterson*).

[61] SCHWARTZ, *supra* note 2, at 262 (referring to Webster v. Reproductive Health Serv., 492 U.S. 90 (1989)). *See infra* note 183 (*Webster*).

any, pre-conference negotiations[62] or conference discussions[63] occurred at this stage in *Webster*. However, like *Patterson*, a tantalizing question arose: Could Chief Justice Rehnquist utilize that *certiorari* vote to achieve his objective of overruling or, at least, dismantling *Roe v. Wade*?[64] With Justices Stevens and O'Connor refusing to repudiate *Roe v. Wade*,[65] a negative answer eventually[66]emerged in *Webster*.

IV. IN THE COURT'S PUBLIC ARENA

Confrontation—direct and physical—between lawyers and Justices, during the litigation process, only occurs on one occasion[67] standing behind the lectern in the Supreme Court's

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[62] *But see* SCHWARTZ, *supra* note 2, at 260-61 (internal 1972, 1973, 1977, and 1980 letters and memoranda).

[63] *But see* SCHWARTZ, *supra* note 2, at 262 (April 28, 1989 post-argument conference votes and discussion from "Justice Marshall's docket book"). *See also* GARROW, *supra* note 31, at 675, 907 (similar).

[64] *See* SCHWARTZ, *supra* note 2, at 260-64.

[65] *See* SCHWARTZ, *supra* note 2, at 333-34 (Stevens "not in favor of overruling *Roe v. Wade*"), 336 (Justice O'Connor's June 23, 1989 draft opinion "categorically refused to agree with the Rehnquist draft repudiating *Roe v. Wade*"). On Roe v. Wade, 410 U.S. 113 (1973) (invalidating, on basis of the Fourteenth Amendment's Due Process Clause, state anti-abortion legislation) *see generally* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 167-202 (1992); GARROW, *supra* note 31; O'BRIEN, *supra* note 4, at 23-42; BARBARA H. CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 1, 4-33; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (new ed. 1992); John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[66] *See, e.g.*, SCHWARTZ, *supra* note 2, at 262-64, 333-38 (documenting the unravelling of Chief Justice Rehnquist's majority during the period from April 28, 1989 (post argument conference) to July 3, 1989 (delivery of *Webster* decision)). *See also* SCHWARTZ, *supra* note 1, at 12-31 (extracts from and discussion of internal court documents and proceedings in *Webster*). *Compare* SCHWARTZ, *supra* note 2, at 401 (Rehnquist's failure to "inter *Roe*" in Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

[67] Two exceptions exist. First, when there is reargument as occurred, for example, in Brown v. Board of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Secondly, when a lawyer endeavors to discuss a pending case with a Justice outside the courtroom. *See, e.g.*, WOODWARD & ARMSTRONG, *supra* note 3, at 79-86 (Thomas G. Corcoran's visits to Justice Black's and Brennan's chambers concerning the petition for rehearing in Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.,

courtroom[68] lawyers[69] can verbally communicate by presenting their arguments and responding to Justices' questions.[70] Briefs on the merits[71] and transcripts of arguments, questions,

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395 U.S. 464 (1969) *reh'g denied*, 399 U.S. 937 (1970)); Warren *supra* note 10, at 337-42 (Department of Justice official's visit to Chief Justice Warren's chambers to influence the decision in pending wiretapping cases); Philip B. Kurland, *Self-Portrait of a Jurist-Without Warts*, 87 YALE L.J. 225, 228 (1977) (book review) (reviewing WARREN, *supra* note 10 (same)).

[68] For physical descriptions, *see, e.g.*, O'BRIEN, *supra* note 4, at 155, 159; SCHWARTZ, *supra* note 2, at 18-19. For photographs, *see supra* notes 2, 4.

[69] Usually lawyers for the litigants but occasionally others are permitted to appear. *See, e.g.*, O'BRIEN, *supra* note 4, at 46 ("unusual step of also granting ten minutes for federal government to present its views" in Webster v. Reproductive Health Services, 489 U.S. 90 (1989)).

[70] Initially, "[v]irtually unlimited time for oral argument" was permitted. O'BRIEN, *supra* note 4, at 285. For example, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) "the [Supreme] Court heard twenty hours of oral argument over five days." O'BRIEN, *supra* note 4, at 285. However, from 1848 there was only "eight hours per case—two hours for two counsel on each side." O'BRIEN, *supra* note 4, at 286. From 1871 that was reduced to four hours by "permitting two hours for each side." O'BRIEN, *supra* note 4, at 286. Then, "in 1911 each side got an hour and a half; in 1925 . . . time was limited to one hour per side." O'BRIEN, *supra* note 4, at 286. "[I]n 1971 the Court limit[ed] arguments to thirty minutes per side." O'BRIEN, *supra* note 4, at 286. Occasionally, this limit is extended, for example, to "two hours" in Dames & Moore v. Reagan, 453 U.S. 654 (1981). O'BRIEN, *supra* note 4, at 286. "Three hours were allowed in *United States v. Nixon* in 1974 . . . and two hours for *Bowsher v. Synar* in 1986." REHNQUIST, *supra* note 10, at 274. Two hours of oral argument were allowed in *Vacco v. Quill* and *Washington v. Glucksberg* on January 8, 1997. *See* Linda Greenhouse, *High Court Hears 2 Cases Involving Assisted Suicide*, N.Y. TIMES, Jan. 9, 1997, at A1, B9. *See also* REHNQUIST, *supra* note 10, at 274-76 (vivid description of oral argument in *Gibbons v. Ogden*). For discussions of Justices' questions, *see, e.g.*, SCHWARTZ, *supra* note 1, at 18 ("incessant interruptions from the bench"). *See generally* Kevin T. McGuire, *Advocacy in the U.S. Supreme Court: Expertise Within the Appellate Bar*, 11 CONST. COMM. 267 (1994).

[71] *See, e.g.*, REHNQUIST, *supra* note 10, at 271 (describing Court requirements "[t]he brief of the petitioner;" "brief of the respondent;" and "briefs from *amici curiae*"). "The records in cases taken to the Supreme Court . . . go back to January Term 1832, the briefs to December Term 1854." Fairman, *supra* note 32, at 365. *See generally* 1-199 LANDMARK BRIEFS, *supra* note 12; H.C. Hallam Jr. & Edward G. Hudon, *United States Supreme Court Records and Briefs: A Union List, with a Note on their Distribution and Microfilming*, 40 LAW LIB. J. 82 (1947); *Supreme Court Briefs*, 25 LOY. L.A. L. REV. 1221-96 (1992) (reprinting briefs in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) and Yee v. City of Escondido, 503 U.S. 519 (1992)). *See also* Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in* American

and answers[72] are published.[73] Of course, the value or usefulness of briefs[74] and oral arguments[75] can be debated. At one

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Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69 (1987-88) (reproducing brief filed in federal court).

[72] "[T]he [Supreme] Court began having oral arguments recorded in 1955. Recordings were made available from the National Archives three years after the date of oral argument and solely for educational purposes." O'BRIEN, *supra* note 4, at 160. In 1977 Chief Justice "Burger no longer permitted recordings to be transferred to the National Archives." O'BRIEN, *supra* note 4, at 160. However, since 1986 these recordings have been "sent to the National Archives." O'BRIEN, *supra* note 4, at 162. "[V]ideotape recordings of oral arguments" is not permitted. O'BRIEN, *supra* note 4, at 162.

[73] In addition to *supra* notes 71, 72 *see, e.g.,* ARGUMENT, *supra* note 12; 2 ORAL ARGUMENTS BEFORE THE SUPREME COURT: OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES (REVISED, AND UPDATED) (Leon Friedman ed., 1983); UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT (Leon Friedman ed., 1974) (petitions, briefs, oral argument, judicial opinions); THE SUPREME COURT CONFRONTS ABORTION: THE BRIEFS, ARGUMENT, AND DECISION IN PLANNED PARENTHOOD V. CASEY (Leon Friedman ed., 1993); MAY IT PLEASE THE COURT: ARGUMENTS ON ABORTION (Peter Irons & Stephanie Guittons eds., 1996) (together with two 120 minute audiocassettes, transcripts of oral arguments in 8 cases from *Griswold v. Connecticut* (1965) to *Planned Parenthood v. Casey* (1992)); MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955 (Peter Irons & Stephanie Guitton eds., 1993) (together with six 90 minute audiocassettes); ALAN F. WESTIN, THE ANATOMY OF CONSTITUTIONAL LAW CASE: YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER: THE STEEL SEIZURE DECISION 113-24 (1990 ed.), Peter H. Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMM. 35, 46-60 (1986) (transcript of Solicitor General Fahy's argument in Korematsu v. United States, 323 U.S. 214 (1944)). For reproduced extracts of arguments, see, for example, O'BRIEN, *supra* note 4, at 26-29, 31-34 (Roe v. Wade), 46-47 (Webster v. Reproductive Health Services), 54-58 (Planned Parenthood v. Casey); The United States Law Week.

[74] *See, e.g.*, NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS 31-33, 39 (1996) (spectrum of views about Louis Brandeis' brief in Muller v. Oregon, 208 U.S. 412 (1908)); Thomson, *supra* note 17, at 192-93 nn.298-300. On Webster v. Reproductive Health Services, 492 U.S. 90 (1989) *see, e.g.*, Sarah E. Burns, *Notes From the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990); Ruth Colker, *Feminist Litigation: An Oxymoron? A Study of the Briefs filed in William E. Webster v. Reproductive Health Services,* 13 HARV. WOMEN'S L.J. 137 (1990); Symposium, *The Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court*, 15 AM. J.L. & MED. 153-243 (1989). *See generally* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH.U. L. REV. 603 (1984); James vanR. Springer, *Some Suggestions on Preparing Briefs on the Merits in the Supreme Court of the United States*, 33 CATH. U.L. REV. 593 (1984).

[75] *See, e.g.*, MEADOR, *supra* note 36, at 464-92 ("Oral Argument"), 591-670("The

end of the spectrum is Professor Schwartz:

> [T]ypical reports on the value of Supreme Court oral argument are greatly exaggerated. True, virtually everyone who has written on the subject, including the Justices . . . , has stressed the importance of the argument to the Court's decision process. [However,] . . . the principal purpose of the argument before the Justices is a public relations one—to communicate to the country that the Court has given each side an open opportunity to be heard. Thus not only is justice done, but it is also publicly seen to be done.
>
> But the cases are rare when arguments of counsel . . . really influence the decision in an important case.[76]

Contemporary Role of Appellate Counsel"); O'BRIEN, *supra* note 4, at 284-93 ("The Role of Oral Argument"); Joseph Story, *Advice to an Advocate*, 27 S. TEX. L. REV. 287 (1986); *Symposium on Supreme Court Advocacy*, 33 CATH. L. REV. 525-91 (1984). *See also infra* notes 76, 77.

[76] SCHWARTZ, *supra* note 2, at 20. *Compare* a more ambivalent view about Brown:

> What of the oral advocacy at the [Brown] reargument? According to Elman, "In *Brown* nothing that the lawyers said made a difference. Thurgood Marshall could have . . . recited 'Mary had a little lamb,' and the result would have been exactly the same." In one sense, while this view is extraordinarily ungenerous, it is true. . . . In many ways the oral arguments provided [Justices] with an opportunity to let off steam—to direct questions with an unfriendly edge at the NAACP's lawyers, so that the Justices could then vote to strike segregation down.
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> . . . Yet it was precisely the brilliance of Marshall's strategy that he forced the justices to a choice, believing—correctly, as it turned out—that once he forced them to choose, they could only make one decision. [Therefore, there can be] provided a far more balanced and astute assessment of Marshall's work than Elman . . . .

TUSHNET, *supra* note 12, at 215-16 (footnote omitted). For analyses of oral arguments in *Brown*, see Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in* Brown, 68 N.Y. U. L. REV. 226 (1993) (Marshall's "oral arguments" in *Brown* "an example of a master legal strategist at work"); Milton Dickens & Ruth E. Schwartz, *Oral Argument Before the Supreme Court: Marshall v. Davis in the School Segregation Cases*, 57 Q.J. SPEECH 32 (1971); David B. Strother, Evidence, Argument and Decision in *Brown v. Board of Education* (1958) (unpublished Ph.D. dissertation, University of Illinois); Ruth E. Schwartz, A Descriptive Analysis of Oral Argument Before the United States Supreme Court in the School Segregation Cases, 1952-1953 (1966) (unpublished Ph.D. dissertation, University of Southern California); Jamye C. Williams, A Rhetorical Analysis of Thurgood Marshall's Arguments Before the Supreme Court in the Public School Segregation Controversy (1959) (unpublished Ph.D. dissertation, Ohio State Univer-

Others, including Chief Justice Rehnquist,[77] espouse a different view. However, *The Unpublished Opinions of the Rehnquist Court* does not utilize briefs or transcripts. As a result, at least two consequences ensue. First, Professor Schwartz does not present a complete picture of the litigation or the Supreme Court's decisionmaking process.[78] Secondly, the opportunity is foregone of assessing which perspective of the oral argument debate is to be preferred. Given the availability of intra-Court materials, that determination could have been attempted by juxtaposing oral argument transcripts against conference discussions, Justices' memoranda and draft opinions.[79] Importantly, this may reveal empirical, rather than hypothetical, answers to an ongoing conundrum: Are the latter influenced or determined by the former? To respond requires direct, but perhaps not immediate, public access to the Supreme Court's sanctum sanctorum.

V. THE ENGINE ROOM?[80]

Under present[81] arrangements or rules,[82] physical entry

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sity). *See also* Gale L. Levinson, *The Rhetoric of the Oral Argument in* The Regents of the Univ. of Cal. v. Bakke, 43 WEST J. SPEECH COMM. 271 (1979); Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410 (1976).

[77] *See, e.g.,* REHNQUIST, *supra* note 10, at 273-83; 288; William Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289 (1986).

[78] *Compare:* "Ordinarily one is not entitled to feel assured he has gotten to the bottom of a case until he has examined [the records in cases and briefs]." Fairman, *supra* note 32, at 365. *But see supra* note 28 (Schwartz's objective).

[79] For a similar criticism of SCHWARTZ, SUPER CHIEF, *supra* note 6, see Stephenson, *supra* note 7, at 465.

[80] *Compare* FRANKFURTER, *supra* note 5, at 9 (calling "the conference room—the workshop of the living Constitution").

[81] The current "privacy of the conference" only "began over fifty years ago when the Justices mistakenly thought that a clerk, secretary, or page had leaked a decision." SCHWARTZ, *supra* note 2, at 20 (citing ELDER WITT, A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT 742 (1986)). *See also* O'BRIEN, *supra* note 4, at 157-58 (referring to a 1909 leak); SCHWARTZ, *supra* note 2, at 133-34 (television reporter's perusal of internal court papers in conference room on June 11, 1987).

[82] *See generally* O'BRIEN, *supra* note 4, at 157-63 (discussing "norm" and "tra-

into the conference room during Justices' discussions is prohibited:[83] "only the nine Justices may attend."[84] However, despite contrary suggestions,[85] secrecy or privacy does not prevail.[86] Revelations about conference discussions and voting come from numerous sources: Justices' docket books,[87] internal memoranda and letters,[88] Justices' diaries,[89] and Justices'

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dition" governing secrecy within Court and "[m]ajority rule on organizational matters").

[83] Is this prohibition constitutional? For the suggestion that "the presumptive presidential privilege in *United States v. Nixon* [418 U.S. 683 (1974)] probably applies equally to the Court's claim of institutional confidentiality" see Eugene Gressman, Book Review, 52 FORDHAM L. REV. 711, 713-14 (1984). For different views about the applicability the First Amendment's press clause contrast Bender, *supra* note 13, at 724 ("media coverage of internal court maneuvers . . . may be protected by the first amendment") with Rehnquist, *Sunshine, supra* note 10, at 562 ("no court decision . . . has ever held the First Amendment . . . authorizes the media to force their way into governmental deliberation . . . in the absence of a . . . positive law to that effect").

[84] SCHWARTZ, *supra* note 2, at 20. *See also* Rehnquist, *Sunshine*, *supra* note 10, at 559 (arguing for retention of tradition that "only the nine members of the [Supreme] Court are permitted to be present while [the Conference of the Supreme Court] is in session").

[85] Rehnquist, *Sunshine*, *supra* note 10, at 559 (conference "is indeed secret, or closed").

[86] As to the initial case screening conference *see supra* note 39 and accompanying text. "Immediately after [this] conference, the chief justice traditionally had the task of reporting the votes [about which cases have been granted or denied oral arguments] to the Clerk. Burger delegated this task to a junior justice, initially to Rehnquist and then to O'Connor." O'BRIEN, *supra* note 4, at 245. *See supra* note 39 (post-argument or merits conference); *see also infra* notes 87-90 (sources of information).

[87] *See, e.g.,* O'BRIEN, *supra* note 4, at 245 ("All justices have large docket books in which they may note votes and discussions"), 296 (some Justices "take copious notes"); Aldisert, *supra* note 7, at 283 (Frankfurter "kept elaborate notes of decision conferences"); Bender, *supra* note 13, at 722 ("some Justices keep detailed logs of conference proceedings).

[88] *See, e.g.*, 1-5 LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1971-78); "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER (Melvin I. Urofsky & David W. Levy eds., 1991): THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS (Melvin I. Urofsky ed., 1987); Thomson, *supra* note 17, at 144 n.23, 167 n.178 (Holmes' correspondence). For location of justices' papers see ALEXANDRA K. WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE (1986); LOCATION GUIDE TO THE MANUSCRIPTS OF SUPREME COURT JUSTICES (Adrienne de Vergie & Mary K. Kell comp., Tarlton Law Library Legal Bibliography Series, No. 16, Sept. 1978)).

[89] *See, e.g.,* JOSEPH LASH, FROM THE DIARIES OF FELIX FRANKFURTER (1975);

discussions with their law clerks.[90]

Confronting this plethora of public information is an obvious question: What, if any, is the value or use to Justices and scholars of discussions and votes[91] at post-argument conferences?

> Conference discussions do not play the role that they once did. When the [Supreme Court's] docket was smaller, in the nineteenth century, conferences were integral to the Justices' collective deliberations. Cases were discussed in detail and differences hammered out. The Justices not only decided how to dispose of cases but also reached agreement on an institutional opinion for the Court. As the caseload grew, conferences became largely symbolic of past collective deliberations. They now [in 1993] serve only to discover consensus. There is no longer time for Justices to reach agreement and compromise on opinions for the Court.
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> . . . .
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> [J]ustices may express their views on the merits of each case for an average of three minutes . . . . [T]he Court's caseload and conference schedule permits an average of six minutes per pending case on the Discuss List and about twenty-nine minutes for each case granted full consideration.
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> Some cases . . . are discussed at greater length and even at more than one conference. But conference discussions have

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Atkinson, *supra* note 5, at 717 n.5 (Justice Burton's "diary"); Ulmer, *supra* note 12, at 694, 697-700 (citing and quoting from "Burton diary, Library of Congress"); *see also* MR. JUSTICE AND MRS. BLACK, THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK (Paul R. Baier ed., 1986) (Elizabeth Black's diaries).

[90] Professor Paul Bender (who served as law clerk to Justice Frankfurter at the October 1959 Term) confirms that "Justices often relate particular conference incidents to their law clerks." Bender, *supra* note 13, at 722 (reviewing THE BRETHREN, *supra* note 3).

[91] *See, e.g.*, O'BRIEN, *supra* note 4, at 303-04 (describing tentative nature of conference votes and Justices' vote switching). Of course, after the decision has been delivered Justices cannot change their vote *(see, e.g.,* JOHN C. JEFFRIES, JUSTICE LEWIS, JR.: A BIOGRAPHY 530 (1994) (noting Justice Powell's admission that his vote in Bowers v. Hardwick, 478 U.S. 186 (1986) was "probably . . . a mistake"); O'BRIEN, *supra* note 4, at 275 (similar)) except when a rehearing is granted (*see, e.g.*, Ludecke v. Watkins, 333 U.S. 865 (1948) (granting *certiorari* on rehearing after one Justice changed his vote)) or, perhaps indirectly, in subsequent cases.

> less significance in the Court's decision making. The cost . . . is more divided decisions . . . .[92]

Perhaps[93] this explains why *The Unpublished Opinions of the Rehnquist Court* does not significantly[94] utilize or rely on these conference discussions in specific cases[95] to illuminate

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[92] O'BRIEN, *supra* note 4 at 294-95. For elaboration *see* O'BRIEN, *supra* note 4 at 292-302. For a somewhat more benign view of this decisional conference, see, for example, REHNQUIST, *supra* note 10, at 288-95; Rehnquist, *Sunshine*, *supra* note 10. For Chief Justice Rehnquist:

> [The] conference is a relatively fragile instrument . . . which works well for the purpose to which [the Justices] put it, but which also has very significant limitations . . . . If there were a real prospect that extended discussion would bring about crucial changes in [a Justice's] position . . . there would be a strong argument for having that sort of discussion . . . . [However,] the true purpose of the conference discussion of argued cases is not to persuade [other Justices] . . . to alter their views, but . . . to determine . . . the view of the majority of the Court. [I]t is very much the exception and not the rule, [that Justices' minds are changed in conference].

REHNQUIST, *supra* note 10, at 294-95.

[93] However, it may be symptomatic of the fact that "Justices vary in the weight they place on conference deliberations . . . . Some . . . have little interest in discussions. Others take copious notes." O'BRIEN, *supra* note 4, at 296. Professor Schwartz's publications provide three examples. First, SCHWARTZ, SUPER CHIEF, *supra* note 6, relied principally on Justice Frankfurter's papers (*see* Stephenson, *supra* note 7, at 452) and Frankfurter "kept elaborate notes" of these conferences (*see supra* note 87). Secondly, "[m]ost of [Schwartz's] published revelations on what goes on during the Justices' deliberative process have been based upon materials obtained from the Brennan files." SCHWARTZ, *supra* note 1, at ix. *See also* SCHWARTZ, *supra* note 2, at 3 ("willingness of . . . Brennan to make his papers available"). Indeed, the fullest account of a conference discussion in *The Unpublished Opinions of the Rehnquist Court* is Justice Brennan's memorandum (SCHWARTZ, *supra* note 2, at 135-36) on Batson v. Kentucky, 476 U.S. 79 (1986) which is not a principal case in SCHWARTZ, *supra* note 2. Thirdly, Justice Thurgood Marshall's papers in the Library of Congress are the basis of SCHWARTZ, *supra* note 2. *See* SCHWARTZ, *supra* note 2, at 4 ("draft opinions . . . private Court papers. . . [and] post-1986 communications among the Justices . . . are . . . from the Marshall papers"). However, at best, Justice Marshall appears to have made only "sketchy conference notes." SCHWARTZ, *supra* note 2, at 262. *See also infra* note 96.

[94] For an exception see *supra* note 93 (Brennan's memorandum).

[95] The ten principal cases in SCHWARTZ, *supra* note 2 are: Missouri v. Blair, 480 U.S. 698 (1987); Hodel v. Irving, 481 U.S. 704 (1987); California v. Rooney, 483 U.S. 307 (1987); Tompkins v. Texas, 490 U.S. 754 (1989); Patterson v.

the Supreme Court's decision-making process.[96] The real, substantive, and important dialogue, communications, and decisions take place subsequently and occur elsewhere.[97]

VI. INSIDE THE STORM[98]

The Unpublished Opinions of the Rehnquist Court clearly demonstrates—via publication of draft opinions, internal papers, and communications between Justices—that Supreme Court opinions and decisions are formulated in and among the nine Justices' chambers.[99] Given Professor Schwartz's previous publications and other available public sources,[100] this process of Supreme Court[101] decisionmaking—including the role of

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McLean Credit Union, 491 U.S. 164 (1989); Webster v. Reproductive Health Services, 492 U.S. 90 (1989); Hodgson v. Minnesota, 497 U.S. 417 (1990); General Motors Corp. v. United States, 496 U.S. 530 (1990); United Sates v. France, 498 U.S. 335 (1991); Ford Motor Credit Co. v. Department of Revenue, 500 U.S. 172 (1991). For similar documentation and analyses see SCHWARTZ, *supra* note 1, at 12, 15, 23-31 (*Webster*), 31-35 (*Hodgson*), 238-46 (*Patterson*), 247-49 (*Missouri*), 249-52 (*Tompkins*), 252-55 (*Ford Motor*).

[96] For the scant material on post-argument conference and votes in SCHWARTZ, *supra* note 1, see SCHWARTZ, *supra* note 1, at 30, 66, 105, 135-36, 198, 262, 339, 404, 432, 462. For Professor Schwartz's views and more extensive utilization of conference notes to reconstruct conference discussions see SCHWARTZ, *supra* note 1, at viii; *supra* note 6 (previous Schwartz publications).

[97] *See, e.g.*, O'BRIEN, *supra* note 4, at 304 (noting "how important postconference deliberations and communications among the [Justices'] chambers have become for the Court's decision making").

[98] In 1913, Justice Holmes indicated that "[the Justices] are very quiet [in the Supreme Court], but it is the quiet of a storm centre . . . ." OLIVER W. HOLMES, *Law and the Court, in* COLLECTED LEGAL PAPERS, 291, 292 (1920).

[99] In 1993 "[e]ach chamber average[d] about seven people: the justice, three to four law clerks, two secretaries, and a messenger." O'BRIEN, *supra* note 4, at 166.

[100] In addition to *supra* notes 1, 3, 5, 6, 10, 20, 22, 31 (references) see biographies of the justices, for example, JEFFRIES, *supra* note 91; ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994); TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992); 1-9 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971-).

[101] For revelations about the internal decision-making process on other courts see, for example, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) (United States District Court for New York and Court of Appeals for the Second Circuit); MEADOR, *supra* note 36, at 492-96 (United States Court of Appeals for the Third Circuit); James A. Thomson, *Learned Hand: Evaluating a*

law clerks;[102] exchanging draft opinions, correspondence, and memoranda; and switching votes[103]—is not shrouded in mys-

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Federal Judge, 22 N. KY. L. REV. 763, 768 n.19 (1995) (book review) (bibliography on federal courts' histories).

[102] On law clerks' role and functions, especially in the case-screening and opinion writing process, see, for example, MEADOR, *supra* note 36, at 414-30; O'BRIEN, *supra* note 4, at 159 ("The Clerk's Code of Ethics), 166-77, 236-37 ("screening cases"), 313, 315-16 (opinion writing); REHNQUIST, *supra* note 10, at 297-301 (Chief Justice Rehnquist's law clerks "prepare a first draft of a Court opinion" and continue to work on subsequent drafts and final opinion); SCHWARTZ, *supra* note 1, at 257-61 (law clerks "perform . . . a major part of the judicial role"); SCHWARTZ, *supra* note 2, at 22-24 ("law clerks . . . increasingly write the opinions even in the most important cases"); J. HARVIE WILKINSON, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974); WOODWARD & ARMSTRONG, *supra* note 3, Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281 (1994) (views of Justice Thomas' October Term 1992 law clerk); John Greenya, *Super Clerks*, 6 THE WASH. LAW 37 (May/June 1992); George v. Higgins, *The Brethren's Clerks: The Bureau of Backbiting and Recrimination*, 260 HARPER'S 96 (April 1980); Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57 (1962); Martha Swann, *Clerks of the Justices*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 159-61 (Kermit L. Hall ed., 1992), Note, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230 (1981); Melvin I. Urofsky, *William O. Douglas and His Clerks*, 3 WEST LEGAL HIST. 1 (1990); Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326-27 (1990) (reviewing SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989)) ("increasingly heavy reliance . . . on law clerks for the drafting of substantial portions of [Justices'] opinions). For a specific and contentious example of law clerks' possible influence see Saul Brenner, *The Memos of Supreme Court law clerk William Rehnquist: conservative tracts, or mirrors of his justice's mind?*, 76 JUDICATURE 77 (Aug.-Sept. 1992); Schwartz, *Chief Justice Rehnquist, Justice Jackson*, *supra* note 6; Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 161-65 (1986) (discussing Rehnquist's memorandum, written while law clerk to Justice Jackson, arguing that Plessy v. Ferguson, 163 U.S. 537 (1896) not be overruled). *See also* SCHWARTZ, *supra* note 2, at 195, 196, 262 (law clerks' memoranda).

[103] For a discussion about the most famous "switch in time that saved nine" (Professor Thomas Reed Powell's "immortal phrase"—JOHN P. ROCHE, SENTENCED TO LIFE 268 n. 105 (1974)) see, for example, Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994); Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 (1994). For other examples, see O'BRIEN, *supra* note 4, at 309-11; SCHWARTZ, *supra* note 1, at 178-255; SCHWARTZ, *supra* note 2, at 62-63 (O'Connor), 100, 101 (Powell), 132 (Scalia), 195 (Kennedy), 196 (Stevens), 257 (Kennedy), 340, 399 (O'Connor), 463 (Blackmun), 491 (Souter). For allegations that Justice Brennan, despite his views on the merits of Moore v. Illinois, 408 U.S. 786 (1972), switched (or traded) his vote to retain Justice Blackmun's votes in abortion and obscenity cases, see Anthony Lewis, *Supreme Court Confidential*,

tery or secrecy.[104] What emerges is almost a dichotomy:[105] rancour and disagreement—unanimity and consensus.[106] Especially with changes to the Court's membership, the relative proportions and co-existence of those ingredients fluctuates over time and over the legal and constitutional issues confronting the Court. Even so, scholars analyzing internal materials and oral communications from the same period and cases[107] draw starkly different conclusions.

For Professor Schwartz in 1996 the result is an optimistic confirmation that there is a Court:

> [D]iscussion and the draft opinions reproduced [in *The Unpublished Opinions of the Rehnquist Court*] will show what too few realize, that the decisions of the [Supreme] Court are basically collaborative efforts in which nine supreme individualists must co-operate to bring about the desired result.
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> [T]he Justices' decision process . . . is essentially a political process (in the nonperjorative use of that word). Yet all the "lobbying" and efforts of persuasion that go on—the infighting, the drafts and memoranda back and forth among the Justices, the changes made in opinions as part of the bargaining process—all of this is done for the purpose of reaching what the individual justice considers the best result. There is . . . politicking, compromises, and horse-trading in the often

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N.Y. Rev. Books, Feb. 7, 1980, at 3; *The Evidence of the Brethren': An Exchange*, N.Y. REV. BOOKS, June 12, 1980, at 47.

[104] *But compare* SCHWARTZ, *supra* note 2, at 5 ("Court's largely unrevealed decision making process").

[105] For a similar dichotomy in Justices' personal relationships see, for example, PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT (1995); O'BRIEN, *supra* note 4, at 300-01 ("physical aggression" and "[p]ersonal animosities"); James A. Thomson, *An Endless But Productive Dialogue: Some Reflections on Efforts to Legitimize Judicial Review* 61 TEX. L. REV. 743 n.2 (1982) (book review) (providing examples); *see also supra* note 11 (providing additional examples).

[106] For a balancing appraisal see William H. Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

[107] Compare O'BRIEN, *supra* note 4 *with* SCHWARTZ, *supra* note 2 both dealing with the Rehnquist Court and, for example, Webster v. Reproductive Health Services, 492 U.S. 90 (1989).

> complex negotiations . . . needed to attain a working majority, yet all for the purpose of advancing . . . the judicial doctrines in which [the Justices] believe.
> . . . . One privy to the Court's decision process is bound to be impressed by the willingness of Justices to change their views after consideration of the intellectual arguments made by their colleagues.[108]

Others are much more pessimistic.

> [U]nanimous decision[s] and opinion[s] . . . [are] exceptional . . . . The trend [in 1993] is toward less consensus on the Court's rulings. The Justices tend to be increasingly divided over their decisions. Individual opinions have become more highly prized than institutional opinions. The Court now functions more like a legislative body relying simply on a tally of the votes to decide cases than like a collegial body working toward collective decisions and opinions.[109]

Without a physical presence in the Justices' conference room and chambers, how can "Supreme Court aficionados"[110] assess which inference—"nine small, independent law firms"[111] or "one Supreme Court"[112]—more closely corresponds to reality within the Court? Traditionally, the proferred response requires listening to[113] and reading[114] the Justices' explana-

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[108] SCHWARTZ, *supra* note 2, at 5, 26. *See also* SCHWARTZ, *supra* note 1, at xiii ("constant give and take between the justices"). *But see* SCHWARTZ, *supra* note 1, at 256-62 (more pessimistic assessment, including "decline of competence").

[109] O'BRIEN, *supra* note 4, at 284. *See also* O'BRIEN, *supra* note 4, at 15 ("justices now place less of a premium on collegial deliberations"); 276-84 (exceptional examples). For a similar conclusion derived from using Justice Marshall's papers see Tushnet, *supra* note 15, at 545 ("Supreme Court . . . bureaucratic rather than collegial"). *See also* Tushnet, *supra* note 102, at 1327 ("bureaucratization of the Supreme Court").

[110] Bernard Schwartz, *Term Limits*, *supra* note 6, at 530.

[111] Lewis Powell, *What the Justices are Saying* . . . , 62 A.B.A. J. 1454 (1976) (*quoted in* O'BRIEN, *supra* note 4, at 164).

[112] U.S. CONST. art. III, § 1.

[113] *See, e.g.*, O'BRIEN, *supra* note 4, at 284 (describing public access to oral arguments), 440 n.14 (referring to "[i]nterview with Justice Brennan (1987)"). *See also supra* note 9 (regarding oral interviews).

[114] *See supra* note 10 (Justices' publications).

tions. However, Professor Schwartz continues to provide[115] an alluring, possibly more objective, alternative: immersion in documentation produced by Justices[116] during their decisionmaking deliberations.

VII. Making Decisions

Even so, a formidable problem remains. Only a scintilla[117] of existing documentation—in proportion to all of Justice Marshall's papers[118] and papers compiled by the other eight Justices[119] on the ten cases[120]— has been published. Consequently, despite the possibility of eventually obviating this evidentiary deficiency,[121] perspective difficulties[122] must be

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[115] *But see supra* note 15 (suggesting that continuing disclosures of contemporaneous materials may stop).

[116] *But see supra* note 102 (regarding law clerks' role).

[117] *Cf.* WOODWARD & ARMSTRONG, *supra* note 3, at 4 (indicating that authors had collected "eight file drawers" of papers from "eleven" Justices' chambers).

[118] *See supra* note 15 (Marshall papers). For other Justices' papers see *supra* note 88.

[119] Of course, as indicated by their publication in SCHWARTZ, *supra* note 2, some papers of other Justices are in Marshall's papers. *See also infra* note 122 (perspective problem).

[120] *See supra* note 95.

[121] *But see* SCHWARTZ, *supra* note 15 (access restrictions and removal of papers); Thomson, *supra* note 11, at 74 n.51 (Justice Black's conference notes destroyed).

[122] For example, it has been suggested that:

> [i]f . . . manuscript collections are assets, they can be liabilities as well. While Schwartz draws on most of those sources available to him . . . most manuscript citations in [SCHWARTZ, SUPER CHIEF, *supra* note 6] are to . . . the Burton or . . . Frankfurter papers . . . . The reader, therefore, sees the Court largely through the eyes of two of the twelve Justices . . . . [I]ndividual perceptions do make a difference. At the very least, a Justice's own notes and memoranda may create the impression that he is at the center of the bargaining and give and take . . . . Another perspective entirely might come from [another Justice's] court papers . . . . Limited sources are no argument for not doing research, but they do entail risks.

Stephenson, *supra* note 7, at 452-53. *See also* Tushnet & Lezin, *supra* note 12, at 1868 (conceding that, despite utilizing several justices' papers, an "account of what happened behind the scenes in *Brown* . . . cannot be definitive"). However,

taken into account when formulating and assessing conclusions. Several easily identifiable examples—vote switching,[123] openness and susceptibility to intellectual persuasion,[124] intra-mural debate, and dialogue,[125] and personal exertion[126]—protrude from *The Unpublished Opinions of the Rehnquist Court*. Other, more subtly concealed, probabilities can also be extrapolated.[127]

Missouri v. Blair[128] is an exemplary illustration. Nine words—"The writ of *certiorari* is dismissed as improvidently granted"[129]—camouflage what transpired within "the Marble Palace."[130] Of course, preceding filing of briefs and oral argument,[131] were the Justices' conference deliberations and their decision to grant certiorari.[132] Subsequently, a merits-confer-

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> [d]uring Marshall's tenure [1967-1991], nearly all of the Court's internal documents were circulated to all the chambers. Occasionally, however, Marshall's papers include drafts circulated only to a few Justices. Something similar may have happened among the conservative Justices, but the presently available materials do not establish that fact.

Tushnet, *supra* note 15, at 474. *See also supra* note 119 (access to some papers in addition to Justice Marshall's papers).

[123] *See supra* note 103.

[124] *See, e.g.*, SCHWARTZ, *supra* note 2, at 63 ("Powell's dissent led Justice O'Connor to rethink her position in Missouri v. Blair, 480 U.S. 698 (1987)); 101 (Rehnquist and Powell "persuaded" by Scalia's second draft opinion in Hodel v. Irving, 481 U.S. 704 (1987)); 196 (Stevens "persuaded" in Tompkins v. Texas, 490 U.S. 754 (1989)); 340 (O'Connor "apparently convinced by" Stevens in Hodgson v. Minnesota, 497 U.S. 417 (1990)).

[125] *See, e.g.*, text accompanying *infra* note 199.

[126] *See, e.g.*, SCHWARTZ, *supra* note 2, at 338 (Rehnquist's "fifth" draft opinion in *Webster*).

[127] *See* text accompanying *infra* notes 170-71, 193-96, 199-203.

[128] 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. dismissed as improvidently granted*, 480 U.S. 698 (1987). *See also* SCHWARTZ, *supra* note 1, at 247-49 (extracts from and discussion of Justices' draft opinions and letters in *Missouri v. Blair*).

[129] Missouri v. Blair, 480 U.S. 698, 698 (1987) (*quoted in* SCHWARTZ, *supra* note 2, at 64).

[130] SCHWARTZ, *supra* note 2, at 197; *see also* ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 136 (1964) ("marble palace"); O'BRIEN, *supra* note 4, at 156 ("marble temple"); SCHWARTZ, *supra* note 1, at 238 ("Marble Palace"); Irons, *Fancy Dancing*, *supra* note 73 (same).

[131] "Argued November 12, 1986." 480 U.S. 698, 698 (1987).

[132] SCHWARTZ, *supra* note 2, at 30 (certiorari granted "on January 13, 1986"

ence, with Chief Justice Rehnquist presiding,[133] voted—5 to 4[134]—that the Missouri courts' suppression order[135] be reversed.[136] As a result, draft opinions—for the majority, by Justice White, and dissents by Justices Powell and Stevens—were "circulated"[137] inside the Supreme Court. Two crucial letters ensued. First, on January 27, 1987, Justice O'Connor indicated to Justice White that, contrary to her merits—conference vote,[138] affirmance was the correct result.[139] What precipitated this switch?[140] Professor Schwartz is not equivocal: "Powell's ['3rd Draft'[141]] dissent led Justice O'Connor to rethink her position."[142] Indeed, this Powell influence[143] also generated a subsequent draft O'Connor dissent.[144] Thus, a new majority was forged.[145] Why did these five votes[146] not order an affirmance? Extracts from the sec-

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when Chief Justice Berger presided).

[133] SCHWARTZ, *supra* note 2,at 30.

[134] SCHWARTZ, *supra* note 2, at 30, 64 (Chief Justice Rehnquist and Justices Scalia, White, Blackmun, and O'Connor composed the majority, with Justices Brennan, Marshall, Powell, and Stevens dissenting).

[135] SCHWARTZ, *supra* note 2, at 30 (suppression of evidence, including Zola Blair's palm prints and statements to police).

[136] SCHWARTZ, *supra* note 2, at 30.

[137] SCHWARTZ, *supra* note 2, at 63.

[138] *See supra* note 134.

[139] SCHWARTZ, *supra* note 2, at 63 (quoting from letter of Jan. 27, 1987 from O'Connor to White).

[140] *See supra* note 103 (other O'Connor switches). *See generally* NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT (1996); Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (Nov.-Dec. 1993); Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47 (1990); Gene Sperling, *Justice in the Middle*, 261 n.3 ATLANTIC 26 (March 1988); David O. Stewart, *Holding the Center*, 79 A.B.A.J. 48 (March, 1993).

[141] SCHWARTZ, *supra* note 2, at 43. Did Justice Powell circulate his earlier draft opinions? If so, what if any, was their effect on Justice O'Connor?

[142] SCHWARTZ, *supra* note 2, at 63. Were there any conversations between O'Connor and Powell on *Missouri v. Blair*? On Powell, *see generally* JEFFRIES, *supra* note 91.

[143] Justice Stevens also circulated a dissent. SCHWARTZ, *supra* note 2, at 63. *See also* SCHWARTZ, *supra* note 2, at 55-56 (Stevens' draft dissent).

[144] SCHWARTZ, *supra* note 2, at 57-62, 63-64.

[145] SCHWARTZ, *supra* note 2, at 64 ("bare majority" comprising Justices Brennan, Marshall, Powell, Stevens and O'Connor).

[146] *See text* accompanying *supra* note 1; *see also* SCHWARTZ, *supra* note 2, at

ond letter provide a hint:

> By [the time of Justice O'Connor's switch] the Justices were dissatisfied with [the affirmance] result as well [as the reverse decision]. Their view was expressed in a letter from Justice Blackmun to Justice White. "I continue to rest uneasy about [Missouri v. Blair] . . . . You will recall that I so expressed myself at conference and that I then stated that I could go along with a [dismiss as improvidently granted] . . . ."[147]

However, much more information is required. For example, Justice Blackmun was now in the new minority[148] and, therefore, apparently could not control the Supreme Court's disposition of *Missouri v. Blair*. Therefore, too much ambiguity lurks behind Professor Schwartz's summation—"the Justices were dissatisfied"[149]—to know what really happened. When did that dissatisfaction occur or become manifest? Did it include a member of, and, therefore, dissipate, the new majority? If so, what was the catalyst? Were there further discussions, either informally or at another conference, among the Justices, perhaps, initiated by Justice Blackmun?[150] Without providing answers to such questions, *The Unpublished Opinions of the Rehnquist Court*, by disseminating Justices' draft opinions and letters in *Missouri v. Blair*, definitively resolves only one issue: even in cases where no opinions are delivered,[151] substantial

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132 ("There are now five definite votes to [dismiss as improvidently granted California v. Rooney, 483 U.S. 307 (1987)]. I suppose the five prevail") (letter of May 21, 1987 from Justice Blackmun to Justice White).

147 SCHWARTZ, *supra* note 2, at 64.

148 Chief Justice Rehnquist and Justices Scalia, White, and Blackmun.

149 SCHWARTZ, *supra* note 2, at 64; *see also* SCHWARTZ, *supra* note 1, at 249 ("the Justices were unsatisfied").

150 *But see* SCHWARTZ, *supra* note 1, at 42 ("constant personal exchanges in the Warren Court (much of it one-on-one lobbying . . . intended to influence votes) have given way to mostly written contacts through notes and memoranda"). *Compare* SCHWARTZ, *supra* note 2, at 340 ("Justice O'Connor spoke to [Justice Stevens] and was apparently convinced by him" in Hodgson v. Minnesota, 497 U.S. 417 (1990)).

151 *See, e.g.*, SCHWARTZ, *supra* note 2, at 30-64 (Missouri v. Blair, 480 U.S. 698 (1987)); 423-61 (United States v. France, 498 U.S. 335 (1991), *aff'g per curiam*,

work is done by the Justices.[152]

Further confirmation of this judicial diligence appears when *The Unpublished Opinions of the Rehnquist Court* is utilized to confront a perennial conundrum:[153] when did the Rehnquist Court's counter-revolution begin?[154] For Professor Schwartz, "[t]he starting point"[155] was *Hodel v. Irving*.[156]

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886 F.2d 223 (9th Cir. 1989)); 462-92 (Ford Motor Credit Co. v. Department of Revenue, 500 U.S. 172 (1991), *aff'g per curiam*, 542 So. 2d 988 (1989)). Indeed, "*France* well illustrates how the decision rendered by the [Supreme] Court may not reflect the actual decision process or the efforts devoted by the Justices to the case." SCHWARTZ, *supra* note 2, at 423.

[152] *But see supra* note 102 (law clerks).

[153] For previous examples, see RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTER-REVOLUTION? THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN AMERICA (1977); MELVIN I. UROFSKY, THE CONTINUITY OF CHANGE: THE SUPREME COURT AND INDIVIDUAL LIBERTIES 1953-1986 (1991); THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed. 1983); THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION (Bernard Schwartz ed., forthcoming); Paul Bender, *Is the Burger Court Really Like the Warren Court?* 82 MICH. L. REV. 635 (1984) (book reviews); Robert F. Nagel, *On Complaining About the Burger Court*, 84 COLUM. L. REV. 2068 (1984) (book review); Frederick Schauer, *Does Doctrine Matter?*, 82 MICH. L. REV. 655 (1984) (book review); Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257 (1984) (book review). *See also* James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059, 1066 n.21 (1989) (providing references covering all Supreme Court's history).

[154] For debates as to whether and, if so, to what extent there has been continuity or counter-revolution see, for example, STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM (1994); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT (expanded ed., 1993); SCHWARTZ, A HISTORY, *supra* note 6, at 362-69, 372-77, 435-37; SIMON, *supra* note 1; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 359-77 (rev. ed. 1994); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

[155] SCHWARTZ, *supra* note 2, at 66, 103. Significantly, Hodel v. Irving, 481 U.S. 704 (1987) is not mentioned in SCHWARTZ, *supra* note 1 or SCHWARTZ, A HISTORY, *supra* note 6. *Compare* Schwartz, *Term Limits*, *supra* note 6, at 528 (United States v. Lopez, 15 S. Ct. 1624 (1995) "may mark a new turning point in Commerce Clause jurisprudence").

[156] 481 U.S. 704 (1987). *See generally* Daniel C. Kramer, *When Does a Regulation Become a Taking? The United States Supreme Court's Most Recent Pronouncements*, 26 AM. BUS. L.J. 729, 731, 738-40, 755-63 (1988); Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1662-65 (1988); Manuel Lucero, *Just Compensation for a Taking—Fractional Interests Escheated from Tribal Members to the Tribe*, Hodel v.

Three factors are promulgated to sustain this characterization. First, deconstruction of the prevailing property—personal rights dichotomy.[157] Secondly, judicial protection and enforcement of property rights.[158] Thirdly, the Supreme Court's expansive interpretation of the Takings Clause.[159] However, the Justices' deliberations reveal how close the Supreme Court was, at least via *Hodel*, to not venturing into this constitutional terrain.

> [*Hodel*] was originally decided on an entirely different basis, and one wonders about the "might have been" if the draft opinion of the Court prepared by Justice Stevens had come down as the final *Hodel* opinion.
>
> . . . .
>
> *Hodel* has served as the foundation for subsequent Rehnquist Court expansions of the Takings Clause . . . . Had Justice Stevens's original draft opinion [prevailed] . . . it would have removed *Hodel* as a precedent on takings law. [Would] the Court . . . have expanded the Takings Clause without the *Hodel* foundation[?] At a minimum . . . *Hodel* would have been an obscure due process case instead of the starting point for a significant emerging theme in Rehnquist Court jurisprudence.[160]

Irving, 29 NAT. RESOURCES J. 279 (1989); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1621-25 (1988); Susan S. Schmid, Comment, *Escheat of Indian Land as a Fifth Amendment Taking in* Hodel v. Irving: *A New Approach to Inheritance*, 43 U. MIAMI L. REV. 739 (1989); John H. Leavitt, Note, Hodel v. Irving: *The Supreme Court's Emerging Takings Analysis—A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVT'L L. 597 (1988).

[157] SCHWARTZ, *supra* note 2, at 65-66 (noting a cyclical movement from preference for property rights to "preferred status" for personal rights and the Rehnquist Court's "trend in favor of property rights"). *But see* James A. Thomson, *Making Choices: Tribe's Constitutional Law*, 33 WAYNE L. REV. 229, 237-38 n.32 (1986) (suggesting a continuous spectrum, not a personal-property rights dichotomy, exists).

[158] SCHWARTZ, *supra* note 2, at 66.

[159] SCHWARTZ, *supra* note 2, at 66. *See infra* note 173 (examples).

[160] SCHWARTZ, *supra* note 2, at 66, 103. For other "what if" or "might have been" examples see SCHWARTZ, *supra* note 2, at 196, 259, 339, 403, 492. *See also* O'Brien, *supra* note 7, at 213-15 (noting and criticizing this "what might have been" approach).

Changing and private judicial views emerge from the *Hodel* letters, notes, memoranda, and draft opinions. A majority of post-argument conference votes affirmed that the congressional enactment in *Hodel* was unconstitutional.[161] Within that majority "there was considerable diversity of opinion"[162] as to whether this affirmance should be based on the Fifth Amendment's Due Process or Takings Clauses. The former may have commanded most support[163] because Justice Stevens, to whom writing of the Court's opinion was "assigned,"[164] produced a draft judgment relying on due process and avoiding the Takings Clause.[165] Immediately, Justices O'Connor[166] and Scalia[167] circulated letters and draft opinions invoking a takings rationale. Subsequent switches, by Chief Justice Rehnquist and Justice Powell from their conference decisions[168] to affirmance on takings grounds,[169] completed the

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[161] SCHWARTZ, *supra* note 2, at 66 (quoting letter of Nov. 5, 1986 from Justice Powell to Justice Stevens). Apparently, only Chief Justice Rehnquist and Justice Powell dissented. *See* SCHWARTZ, *supra* note 2, at 100, 101.

[162] SCHWARTZ, *supra* note 2, at 66-67 (quoting Nov. 5, 1986 letter).

[163] However, this is not clear for two reasons. First, there is no substantive mention of Justices Brennan, Marshall, and Blackmun in SCHWARTZ, *supra* note 2, at 65-104. Those Justices are referred to in Justice O'Connor's "3rd Draft" concurring opinion (apparently circulated in Feb. 1987 (SCHWARTZ, *supra* note 2, at 101) after the Stevens' opinion was circulated in Oct. or Nov. 1986 (SCHWARTZ, *supra* note 2, at 100)) as joining that O'Connor opinion. SCHWARTZ, *supra* note 2, at 93. Ultimately, all three Justices joined Justice O'Connor's opinion for the Court based on the Takings Clause. Hodel v. Irving, 481 U.S. 704, 718 (1987). Secondly, Justice Stevens may have changed his mind from takings to due process while drafting the *Hodel* opinion.

[164] SCHWARTZ, *supra* note 2, at 67.

[165] SCHWARTZ, *supra* note 2, at 68-82 (Stevens' draft opinion).

[166] SCHWARTZ, *supra* note 2, at 100 (Nov. 3, 1986 letter), 101-02 (draft opinion), 103 (April 21, 1987 and May 5, 1987 memoranda and re-drafted concurring opinion and subsequently revised opinion of the Court). *See also* SCHWARTZ, *supra* note 2, at 93-99 (3rd draft of O'Connor's concurring opinion).

[167] SCHWARTZ, *supra* note 2, at 83-92 (4th draft concurrence), 100-01 (draft concurrence),102-03 (4th draft), 104 (March 3, 1987 Scalia note to Chief Justice Rehnquist).

[168] SCHWARTZ, *supra* note 2, at 100, 101.

[169] SCHWARTZ, *supra* note 2, at 101 (letters of Feb. 26, 1987 and March 3, 1987 from Justice Powell and Chief Justice Rehnquist to Justice Scalia). *See also,* Hodel v. Irving, 481 U.S. 704, 719 (1987) (Rehnquist and Powell join Scalia's concurrence).

coup d'etat. *Hodel*, therefore emerged from the Supreme Court as a Takings Clause case.

In this changing mosaic, at least two more aspects—pushing in opposite directions—remain. First, what, if any, was the role of Justices Brennan, Marshall, and Blackmun?[170] Could or should they have joined Justices Stevens and White to constitute five votes for a due process decision? Perhaps, they did not, like Professor Schwartz, envisage *Hodel* to be important or foundational.[171] If Justices Brennan, Marshall, and Blackmun had done so, Professor Schwartz's focus on and laments over *Hodel* would have been unnecessary. Unfortunately, in this context, silence in *The Unpublished Opinions of the Rehnquist Court* is deafening. Secondly, *Hodel* correspondence between Chief Justice Rehnquist and Justice Scalia reveals strategies and views which would lead to and facilitate future expansion of the Takings Clauses's coverage.[172] Consequently, it became easier in *Lucas v. South Carolina Coastal Council*[173] to assimilate a

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[170] *See supra* note 163. Justices Brennan, Marshall, and Blackmun considered that *Hodel* did not limit Andrus v. Allard, 444 U.S. 51 (1979). This is important because, for Professor Schwartz, in 1996 "*Allard* is still the most substantial barrier to [the Rehnquist Court's] broadening of the Takings Clause to include all regulatory diminutions in property value." SCHWARTZ, *supra* note 2, at 104. For more ambivalence over the *Hodel-Allard* relationship see Michelman, *supra* note 156, at 1600 n.2(iii).

[171] *See* text accompanying *supra* note 155 ("starting point"). *But see* Kramer, *supra* note 156, at 738 ("astonishing if [Hodel] proves to be a leading case").

[172] SCHWARTZ, *supra* note 2, at 104 (exchange of notes on March 3, 1987 between Rehnquist and Scalia).

[173] 505 U.S. 1003, 1019 (1992) (states must compensate owners for any regulation that prevents "all economically beneficial use" of land). *See generally* Kenneth Berlin, *Just Compensation Doctrine and the Workings of Government: The Threat from the Supreme Court and Possible Responses*, 17 HARV. ENVTL. L. REV. 97 (1993); Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbinger of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 629-54 (1993); Alfred P. Levitt, Comment, *Taking on a New Approach: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L. REV. 197 (1993); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1091-94 (1993); Steven Ward, Note, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. REV. 165 (1992); Robert M. Washburn, *Land Use*

regulation denying "all beneficial use" without effectuating "a physical taking" with "an outright physical taking."[174] At least in this domain,[175] Chief Justice Rehnquist was able to effectuate a conversion of intramural correspondence into constitutional law.

Repose is, therefore, not to be seen in *The Unpublished Opinions of the Rehnquist Court*. "[F]lux,"[176] deep divisions, and struggles are pervasive.[177] Ritual illustrations, involving draft opinions, letters, memoranda, and Justices changing their votes[178] are also provided by the internal antecedents of *California v. Rooney*[179] and *Tompkins v. Texas*.[180] In addition, a litany of abortion cases[181]—*Roe*,[182] *Webster*,[183]

Control, The Individual and Society: Lucas v. South Carolina Coastal Council, 52 MD. L. REV. 162 (1993); Symposium, Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1369-1445 (1993); Note, *Takings Clause—Regulatory Takings*, 106 HARV. L. REV. 269 (1993); Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993).

[174] SCHWARTZ, *supra* note 2, at 104.

[175] *But see* notes 60, 66 (noting Rehnquist's failure to achieve objectives in *Patterson*, *Webster*, and *Planned Parenthood*).

[176] Stephenson, *supra* note 7, at 465 (noting "flux" as "a characteristic of [Supreme Court] decisionmaking" is supported by internal documents during 1940-1949 and 1953-1969).

[177] But does this merely reflect the selection process by which cases were included in Professor Schwartz's publications? *See supra* note 6. There may be cases, even a high proportion, where nine Justices easily and quickly reach a unanimous result. But, as *Brown v. Board of Education* demonstrates (*see supra* note 12), public unanimity may conceal Justices' divisions and struggles.

[178] *See, e.g.*, SCHWARTZ, *supra* note 2, at 132 (although in majority, Justice Scalia switched to dismiss certiorari as improvidently granted because he subsequently concluded that Supreme Court was "without jurisdiction").

[179] 483 U.S. 307 (1987); *see* SCHWARTZ, *supra* note 2, at 105-34.

[180] 490 U.S. 754 (1989); *see* SCHWARTZ, *supra* note 2, at 135-96; SCHWARTZ, *supra* note 1, at 249-52.

[181] *See generally supra* note 65 (references).

[182] Roe v. Wade, 410 U.S. 113 (1973). In addition to *supra* note 65 (references) see SCHWARTZ, *supra* note 1, at 229-36.

[183] Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). *See generally* SIMON, *supra* note 1, at 127-43, 314; Lynn A. Baker, Webster *and Incomplete Judicial Review*, 6 J.L. & POL. 549 (1990); James Bobb & Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157 (1989); Randall D. Eggert, et al., *"Of Winks and Nods"*—Webster's *Uncertain Effect on Current and Future Abortion Legislation*, 55 MO. L. REV. 163 (1990); David M. Smolin, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Com-*

Hodgson,[184] and *Planned Parenthood*[185]—reinforce these themes. Contemporaneously, the power and pivotal position of one Justice is starkly revealed. Three occasions are highlighted and extolled by Professor Schwartz.[186]

> Had Justice O'Connor joined the Rehnquist draft opinion of the Court in *Webster*, *Roe* would have been relegated to the limbo of discarded decisions.
>
> . . . .
>
> As in *Webster*, Justice O'Connor was again to be the key Justice in *[Hodgson]*; her votes made it possible for the final decision to come down as it did.
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> . . . .
>
> The bare majority for both holdings [in *Hodgson*] was supplied by Justice O'Connor's vote.
>
> . . . .
>
> O'Connor's final posture was the crucial element of the *Hodgson* decision. It meant that there was no real possibility of overruling *Roe v. Wade*.
>
> . . . .
>
> Justice O'Connor, once more [was] the key vote in [*Planned Parenthood*] . . . .
>
> Justice Blackmun . . . [in *Planned Parenthood*] stressed that

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mentaries, 20 CUMB. L. REV. 71 (1989).

[184] Hodgson v. Minnesota, 497 U.S. 417 (1990). *See generally* Simon, *supra* note 1, at 144-51; 314; James Shortall, Hodgson v. Minnesota: *Balancing the Competing Interests of the State, Parents and Minor: A Missed Opportunity?*, 69 DENV. L. REV. 539 (1992); Selina K. Hewitt, Note, *Abortion*— Hodgson v. Minnesota: *Chipping Away at* Roe v. Wade *In the Aftermath of* Webster, 18 PEPP. L. REV. 955 (1991); Note, *Parental Notification Statutes*, 104 HARV. L. REV. 247 (1990).

[185] Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See generally* Simon, *supra* note 1, at 154-58, 163-67, 315; Earl M. Maltz, *Abortion, Precedent and the Constitution: A Comment on* Planned Parenthood v. Casey, 68 NOTRE DAME L. REV. 11 (1992); David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1; John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in* Casey, 42 BUFF. L. REV. 187 (1994); Kathleen M. Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 27-34 (1992); Note, *Abortion Rights*, HARV. L. REV. 201 (1992).

[186] For another example see Regents of the University of California v. Bakke, 438 U.S. 265 (1978); JEFFRIES, *supra* note 91, at 455-99, 643-49; *A Symposium*, Regents of the University of California v. Bakke, 67 CAL. L. REV. 1-189 (1979).

Roe . . . survived by only one vote. . . . [187]

Just how close were the five to four votes becomes apparent in *The Unpublished Opinions of the Rehnquist Court*. The April 28, 1989 post-argument *Webster* conference vote revealed five Justices in favor of sustaining the constitutional validity of Missouri law abortion restrictions[188] with the possibility of a Rehnquist opinion "dismantl[ing]" Roe.[189] However, on June 23, 1989, Justice O'Connor, who had been one of the five, sent to other Justices the "1st Draft"[190] of a concurrence which "categorically refused to agree with the portion of the Rehnquist draft repudiating *Roe v. Wade*" and which continued adherence to constitutionality of the state abortion law.[191] But, what influenced Justice O'Connor's position on *Roe*?[192] Professor Schwartz does not furnish an express or categorical answer. Inferentially, a response might be extrapolated: Justice O'Connor was persuaded by three[193] documents—Justice Stevens' letters of May 27, 1988 and May 30, 1989,[194] and

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[187] SCHWARTZ, *supra* note 2, at 339, 400, 401.

[188] SCHWARTZ, *supra* note 2, at 262 ("Chief Justice [Rehnquist] and Justices White, O'Connor, Scalia, and Kennedy"). Justice Stevens' position was "not clear" at the conference. SCHWARTZ, *supra* note 2, at 262, 333. However, Stevens' May 30, 1989 letter to Chief Justice Rehnquist indicated that Stevens "was not in favor of overruling *Roe v. Wade* . . . ." SCHWARTZ, *supra* note 2,at 334. *See also* SCHWARTZ, *supra* note 1, at 24 (same).

[189] SCHWARTZ, *supra* note 2, at 262.

[190] SCHWARTZ, *supra* note 2, at 313.

[191] SCHWARTZ, *supra* note 2, at 336; *see also* SCHWARTZ, *supra* note 1, at 29. However, Justice O'Connor's opinion left open the possibility that *Roe* could be overruled. Webster v. Reproductive Health Serv., 492 U.S. 490, 525-26 (1989) ("when the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of Roe v. Wade, there will be time enough to re-examine Roe"). That possibility was not closed until Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See supra* note 185.

[192] *See supra* note 191 (state statute in *Webster* did not "actually turn[] on the constitutional validity of *Roe v. Wade*"). However, the real question remains: Why did Justice O'Connor adopt this position?

[193] Also, possibly, memos to Justice Blackmun from Justices Brennan and Marshall. SCHWARTZ, *supra* note 2, at 335.

[194] SCHWARTZ, *supra* note 2, at 333; *see also* SCHWARTZ, *supra* note 2, at 289-90 (reproducing May 30 letter); SCHWARTZ, *supra* note 1, at 26; Simon, *supra* note 1, at 136-36 (partially reproducing Justice Stevens' May 30, 1989 letter).

Justice Blackmun's draft dissent[195]—to refrain from joining Chief Justice Rehnquist's "dismantl[ing]" of *Roe*. Again,[196] however, on a crucial matter, silence reverberates through *The Unpublished Opinions of the Rehnquist Court.*

Much clearer sustenance is provided in relation to *Hodgson v. Minnesota*.[197] Once more, although in *Hodgson* it occurred twice, Justice O'Connor's position changed. Initially, Justice O'Connor voted at the December 1, 1989 *Hodgson* post-argument conference, "to uphold," with four other Justices, a notification requirement and "judicial bypass procedure" in Minnesota legislation.[198] This reversal and reasons for its occurrence are succinctly documented and explained by Professor Schwartz.

> After the conference, there was an interchange between Justices Stevens and O'Connor. [A] memo [from Justice O'Connor was challenged] in a Stevens letter to the Chief Justice on December 7, 1989 . . . .
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> . . . .
>
> After she had read Stevens's letter, Justice O'Connor spoke to [Stevens] and was apparently convinced by him. On December 8, O'Connor wrote to the Chief Justice . . . . "[I]f I understand [Stevens'] approach correctly . . . I think I can agree with it. That leads me to change my vote . . . ." This meant that O'Connor was now voting to strike down both provisions of the Minnesota law.[199]

Subsequently, on June 11, 1990, Justice O'Connor switched back to holding that the judicial bypass procedure "pass[ed] constitutional muster."[200] However, the parental notification

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[195] SCHWARTZ, *supra* note 2, at 291-312 (reproducing draft opinion), 334-35; *see also* SCHWARTZ, *supra* note 1, at 27-8 (same); Simon, *supra* note 1, at 136 (same).

[196] *See supra* text accompanying *supra* notes 47-51, 62, 170-71 (examples).

[197] *See supra* note 184.

[198] SCHWARTZ, *supra* note 2, at 339.

[199] SCHWARTZ, *supra* note 2, at 340. *See also* SCHWARTZ, *supra* note 1, at 32 (same); Simon, *supra* note 1, at 148, 314 (Justice O'Connor's discussion with Justice Stevens and December 8, 1989 letter to Chief Justice Rehnquist).

[200] SCHWARTZ, *supra* note 2, at 399. *See also* SCHWARTZ, *supra* note 1, at 33 (same).

requirement remained "invalid."[201] In *The Unpublished Opinions of the Rehnquist Court* this was crucial: "*Hodgson*, . . . with Justice O'Connor's first vote to strike down a law regulating abortion, has proved the Thermidor for the would-be Rehnquist 'revolution' . . . in abortion law."[202] Only one question remains: Should Professor Schwartz's heroine—Justice O'Connor—be replaced with a hero: Justice Stevens?[203]

VIII. CONCLUSION

Without a constitutional amendment or perpetual failure to fill vacancies, cases will continue to be decided by the Supreme Court. Inevitably, therefore, what transpires within the sanctum sanctorum will not remain secret. Eventually, Justices' papers and recollections do litter the public domain. This occurrence, whether after a relatively short or extremely long gestation, has not impaired judicial integrity or independence. Indeed, the reverse result is, especially through exposure to the Justices' decisionmaking processes, often achievable. Professor Schwartz, through the Brennan and Marshall papers, offers, in *The Unpublished Opinions of the Rehnquist Court*, a fascinating, almost contemporaneous, glimpse into the Supreme Court. For those who will never get there, an irresistible vicarious journey beckons.

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[201] SCHWARTZ, *supra* note 2, at 399. *See also* SCHWARTZ, *supra* note 1, at 33 (same).

[202] SCHWARTZ, *supra* note 2; at 401. *See also* SCHWARTZ, *supra* note 1, at 35.

[203] *See* Justice Stevens' crucial letters of May 27, 1988, May 30, 1989, and Dec. 7, 1989 and conversation with Justice O'Connor. SCHWARTZ, *supra* note 2, at 289-90, 333-34, 340; Simon, *supra* note 1, at 135-36, 147-48, 314. *See generally* ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: CHURCH/STATE RELATIONS (1991); ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE (1988); Paula C. Arledge, *John Paul Stevens: A Moderate Justice's Approach to Individual Rights,* 10 WHITTIER L. REV. 563 (1989); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens,* 1989 DUKE L.J. 1087; *Symposium: Perspectives on Justice John Paul Stevens, 27* RUTGERS L.J. 521-661 (1966).

RECENT DECISIONS

EVIDENCE—PHYSICIAN-PATIENT PRIVILEGE—RULE 503 LIMITS WAIVER IN MEDICAL MALPRACTICE CASES TO INJURIES PLACED IN ISSUE AND EXCLUDES EVIDENCE OBTAINED FROM EX PARTE CONTACTS*

On December 2, 1991, Cynthia Scott filed a medical malpractice action against Dr. Joel Flynt, alleging he was negligent during the delivery of her daughter, Vivian Faith Scott.[1] After discovery began, Dr. Flynt filed a Motion to Compel Medical Waiver asking the court to force the plaintiff to unconditionally waive her medical privilege so defense counsel could speak ex parte with the plaintiff's treating physicians.[2] The plaintiff asserted that any waiver violated the rules of civil procedure and her right to privacy.[3]

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* Best Case Note Award. Presented by the law firm of Ott & Purdy, Jackson, Mississippi.

[1] Scott v. Flynt, No. 92-IA-00397-SCT, 1996 WL 183459 (Miss. Apr. 18, 1996). Vivian subsequently suffered from paralysis in her left arm. *Scott*, 1996 WL 183459, at *2. Scott filed her suit in the Forrest County Circuit Court. *Id.* at *6. Dr. Flynt filed his answer on February 18, 1992, and asserted several defenses. *Id.*

[2] *Scott*, 1996 WL 183459, at *1. The defendants filed the motion in order to obtain access to all potential health care providers of the plaintiff. *Id.*

[3] *Id.* The plaintiff claimed that the motion, if granted, violated Mississippi

On April 2, 1992, the Forrest County Circuit Court granted the defendant's motion and ordered the plaintiff to waive her medical privilege.[4] On appeal, The Mississippi Supreme Court held: Reversed and remanded.[5] The court held that in a medical malpractice action the plaintiff waived his medical privilege only to matters placed in issue by the pleadings[6] and that evidence garnered as a result of ex parte contacts was inadmissible at trial.[7]

I. Related Law

Mississippi made information shared between a patient and his doctor privileged in 1906.[8] However, the court has

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Rule of Civil Procedure 26(b)(1), which dictates discovery methods. *Id.* at *6. The plaintiff also claimed that she would only permit discovery of relevant medical information. *Id.* at *1. The Mississippi Supreme Court did not address the plaintiff's constitutional claim. *Id.* at *10.

[4] *Id.* at *1. The opinion did not detail the scope of the waiver the court ordered the plaintiff to execute but the order permitted defense counsel to conduct ex parte interviews with the medical providers of the plaintiff. *Id.* After the circuit court granted the motion, the plaintiff filed a Petition for Extraordinary Relief with the Mississippi Supreme Court. *Id.* A three-justice panel stayed discovery in the case until the full court could determine the legal issues presented. *Id.* The panel also decided that the court would treat the petition as an Interlocutory Appeal. *Scott*, 1996 WL 183459, at *1. The circuit court then stayed all matters in the case. *Id.* at *2.

[5] *Id.* at *10. The Mississippi Supreme Court reversed and remanded because the circuit court improperly granted the defendant's motion requiring the plaintiff to execute an unconditional waiver of her medical privilege. *Id.* at *6.

[6] *Id.* The court held that, in medical malpractice and personal injury actions, the plaintiff only waived information pertaining to injuries placed at issue. *Id.* The court also stated that counsel should "amicably" resolve questions of relevancy or, if that was unfeasible, the court would. *Id.* The court stressed that lower courts should never force plaintiffs to execute unrestricted waivers of their medical privilege. *Id.*

[7] *Scott*, 1996 WL 183459, at *10. The court reasoned that excluding evidence obtained through ex parte contacts with the plaintiff's treating physician by defense counsel still permitted access to relevant information without allowing the plaintiff to manipulate the privilege. *Id.*

[8] Hubert S. Lipscomb, *Privileged Communications Statute—Sword and Shield*, 16 MISS. L.J. 181, 181 (1944). The statute provided that physicians shall not divulge a patient's communications made within the context of the physician-patient relationship without the patient's consent. MISS. CODE ANN. § 3695 (1906). There was no physician-patient privilege at common law. 81 AM. JUR. 2D *Witness-*

held that a plaintiff can contractually[9], expressly[10], or constructively waive the privilege.[11]

A. Effect of Plaintiff's Testimony in General

The Mississippi Supreme Court addressed the issue of constructive waiver of the physician-patient privilege early on in *Coca Cola Bottling Works v. Simpson*.[12] In *Coca Cola*, the plaintiff stated on cross-examination that he was willing to let his physician testify.[13] The defendant then offered the

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es § 436 (1992). Most jurisdictions enacted some form of a testimonial medical privilege. Laural C. Alexander, Comment, *Should Alabama Adopt a Physician-Patient Privilege?*, 45 ALA. L. REV. 261 n.2 (1993). Legislatures enacted physician-patient privilege statutes to cultivate candor in communication and to protect patients against future disclosures of potentially embarrassing information. *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1531 (1985). However, one commentator noted that filing suit announced an injury to the world and abrogated the need for confidentiality of communication regarding those injuries. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2389 at 855 (McNaughton rev. ed. 1961).

The Mississippi Supreme Court ruled that "communications" included a physician's observations and diagnoses. Yazoo & M. V. R. Co. v. Messina, 67 So. 963, 966 (Miss. 1915), *rev'd on other grounds, sub nom.* Ill. Cent. R.R. Co. v. Messina, 240 U.S. 395 (1916). The court also held that physicians are only prevented from testifying on privileged matters. Metropolitan Life Ins. Co. v. Evans, 184 So. 426, 427 (Miss. 1938). The court also held that communications made to a dentist are not privileged. Gulf, Mobile & N. R. Co. v. Willis, 157 So. 899, 901 (Miss. 1934).

[9] Edwards v. Ellis, 478 So. 2d 282, 285-86 (Miss. 1985). The court held that the trial court did not err in admitting blood alcohol test results because the defendant signed a waiver form. *Edwards*, 478 So. 2d at 285-86. *See* Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 918 (Miss. 1938) (holding plaintiff waived privilege by contract prior to trial). *But cf.* Pritchard v. Ins. Co. N. Am., 61 F.R.D. 104, 108 (N.D. Miss. 1973) (holding accident policy must expressly provide for waiver by insured).

[10] Grant v. Norwood, 161 So. 2d 189, 190 (Miss. 1964). The *Grant* court held that the personal representative of the patient properly waived the privilege. *Grant*, 161 So. 2d at 190. *See also In re* McCough's Will, 222 So. 2d 673, 676 (Miss. 1969) (holding either temporary administratrix or executor could properly waive deceased's medical privilege).

[11] Hardy v. Riser, 309 F. Supp. 1234, 1239 (N.D. Miss. 1970). *Hardy* held that, under Mississippi law, a plaintiff constructively waived the medical privilege if he testified concerning his injuries. *Hardy*, 309 F. Supp. at 1239.

[12] 130 So. 479 (Miss. 1930).

[13] *Coca Cola*, 130 So. at 480. When asked if he was "perfectly willing" to let

plaintiff's physician as a witness and the plaintiff objected.[14] The trial court sustained the objection.[15] On appeal, the Mississippi Supreme Court held that the plaintiff did not waive the privilege by stating on cross-examination that he was willing to let his physician testify.[16] The court stated that the patient's waiver was inoperative because it was involuntary.[17]

B. Effect of Plaintiff's Testimony Regarding Treatment

The Mississippi Supreme Court has consistently held that a patient can constructively waive the medical privilege.[18]

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his physician testify, the plaintiff did not respond. *Id.* During cross-examination, the plaintiff disclosed "fragments of information" concerning his treatment. *Id.* at 481.

[14] *Id.* at 480-81. After the plaintiff objected, he took the stand. *Id.* at 481. Upon being informed by his attorney that any communications between him and his physician were privileged, the plaintiff stated he was not willing to let his physician testify. *Id.*

[15] *Id.* The defendant argued that the plaintiff's waiver was irrevocable. *Id.* The defendant also argued that the plaintiff's statements during cross-examination concerning his treatment waived the privilege. *Id.*

[16] *Id.* The court also held that the plaintiff did not waive the privilege by disclosing certain aspects of his treatment under cross-examination. *Id. But see* Dennis v. Prisock, 181 So. 2d 125, 128 (Miss. 1965) (holding plaintiff waived privilege by testifying to what physician said and did during examination).

[17] *Coca Cola*, 130 So. at 481. The court reasoned that the plaintiff did not waive the privilege voluntarily because he asserted the privilege only after he consulted with his attorney. *Id. But see* Clary v. Breyer, 13 So. 2d 633, 635 (Miss. 1943) (holding that plaintiff's offer to let her physician testify waived privilege where testimony had not reached half-way mark and physician was available to testify). The court also stated that a plaintiff may not partially waive the privilege. *Coca Cola*, 130 So. at 481. *See* Pullin v. Nabors, 128 So. 2d 117, 120 (Miss. 1961) (holding plaintiff may not partially waive privilege).

[18] Gulf, Mobile & Ohio R.R. Co. v. Smith, 50 So. 2d 898, 901 (Miss. 1951). The court stated that the plaintiff was free to call his physician but the defendant could not call the plaintiff's physician over his objection. *Gulf, Mobile & Ohio*, 50 So. 2d at 901. *See* Jenkins v. State, 111 So. 433, 434 (Miss. 1927) (holding grandmother of twelve year old rape victim could waive privilege to facilitate conviction of attacker). *See also* Johns-Mansville Prod. Corp. v. Cather, 44 So. 2d 405, 408 (Miss. 1950) (holding plaintiff waived privilege when he tried to persuade company doctor to testify). In 1944, the Mississippi legislature amended the Privileged Communications Statute to allow the personal representative of a deceased patient to waive the privilege. MISS. CODE ANN. § 1697 (Supp. 1944). The Mississippi Supreme Court subsequently approved the amendment. Ritter v.

The court again addressed the behavior needed to constructively waive the privilege in *Bryan Bros. Packing Co. v. Grubbs*.[19] In *Bryan Bros.*, the trial court instructed the jury that the plaintiff waived her medical privilege by testifying about the treatment she received from her physician.[20] On appeal, the court held that the instruction was erroneous because the plaintiff did not testify about confidential communications between her and her physician.[21]

C. Effect of Calling One of Many Treating Physicians

The Mississippi Supreme Court addressed whether calling one of many treating physicians waived the medical privilege in *Hill v. Stewart*.[22] In *Hill*, the trial court permitted the defendant, over the plaintiff's objection, to depose six physicians who treated the deceased patient.[23] At trial, the plaintiff called one of the treating physicians to testify.[24] After the trial court entered a directed verdict for the defendant, the plaintiff appealed.[25] On appeal, the court ruled that the trial

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Johnson, 123 So. 2d 617, 619-20 (Miss. 1960).

[19] 168 So. 2d 289 (Miss. 1964).

[20] *Bryan Bros.*, 168 So. 2d at 292. The plaintiff requested the instruction that also stated the defendants had a right to call the plaintiff's physician. *Id.* The trial court also gave an instruction, at the defendant's request, that only the plaintiff had the power to call her physicians to testify. *Id.*

[21] *Id.* The court specifically ruled there was no express or implied waiver. *Id.* The court stated that the plaintiff only testified that she had been treated, not the extent of the treatment. *Id.* The court also noted that the trial judge exacerbated the error when he instructed the jury that only the plaintiff could waive the privilege. *Id.*

[22] 209 So. 2d 809 (Miss. 1968), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985).

[23] *Hill*, 209 So. 2d at 813. *Hill* was a medical malpractice action in which the plaintiffs claimed that the defendant caused the death of Julius Hill when he failed to diagnose his diabetes. *Id.* at 810. The trial court required the six physicians to be deposed as to their diagnosis and treatment of the deceased. *Id.* at 813.

[24] *Id.* at 811. The physician, Dr. Samuel J. Simmons, testified that Mr. Hill died of "severe diabetic acidosis." *Id.* He also testified that the deceased's symptoms indicated diabetes. *Id.*

[25] *Id.* at 812. The defendant contended that the Mississippi Supreme Court should not rule on the propriety of the order permitting him to depose the

court erred in overruling the objections to the depositions.[26] The court held that the plaintiff did not waive the privilege by calling one of the deceased's attending physicians to testify.[27]

D. Effect of Calling One Physician to Testify

While the court held that calling one of many treating physicians did not waive the privilege as to the others, the court next addressed whether calling one physician to testify waived the privilege in *Tarrants v. State*.[28] In *Tarrants*, the defendant called his physician to testify on the issue of the defendant's insanity.[29] On cross-examination, the prosecutor, over objection, asked the physician if the defendant told him about the commission of the crime.[30] On appeal after convic-

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plaintiff's treating physicians because the trial court reserved ruling on admitting the depositions into evidence. *Id.* at 813. The court rejected that argument and stated that the plaintiff was entitled to an admissibility hearing prior to trial. *Id.*

[26] *Id.* at 813-14. The court also noted that the plaintiff properly presented the issue for review. *Id.* at 813.

[27] *Id.* at 813. The court stated that if a number of physicians treated the plaintiff for the same ailment, he retained the privilege regarding the physicians not called to testify. *Id. See* Davis v. Elzey, 88 So. 630, 633 (Miss. 1921) (holding defendant had no right to call physicians who treated plaintiff to rebut testimony of other treating physicians.); United States Fidelity & Guar. Co. v. Hood, 87 So. 115, 118-19 (Miss. 1920) (holding defendant could not call another of plaintiff's treating physicians to testify). *See also* Hamel v. Southern Ry. Co., 74 So. 276, 277 (Miss. 1917) (holding plaintiff did not waive privilege when he called another physician to refute defendant's witness). The *Hill* court also noted that, in medical malpractice actions, a waiver as to the sued physician did not waive the privilege regarding the plaintiff's treating physicians. *Hill*, 209 So. 2d at 814 (citing 58 AM. JUR. *Witnesses* § 458 (1948)). A majority of jurisdictions have held that calling one treating physician waived the privilege as to other treating physicians. Richard J. Kohlman, *Protected Communication Between Physician and Patient*, 45 AM. JUR. PROOF OF FACTS 2D 595, 615-16 (1986).

[28] 236 So. 2d 360 (Miss. 1970), *cert. denied*, 401 U.S. 920 (1971).

[29] *Tarrants*, 236 So. 2d at 366. The prosecution accused the defendant of planting a bomb. *Id.* at 361. On direct examination, the defendant's attorney asked the physician to assume that the defendant planted the bomb and then asked him whether or not he thought the defendant was sane. *Id.* at 366. The physician testified he thought the defendant was insane. *Id.*

[30] *Id.* at 366. The physician testified that the defendant told him about planting the bomb. *Id.* The trial court found that the defendant waived his privilege when he raised his state of mind as an issue and therefore the prosecutor could ask the defendant's physician any question related to his sanity. *Id.*

tion, the court held that the admission of the physician's testimony on cross-examination was harmless error.[31] Justice Rodgers concurred in the result but stated that the admission of the physician's testimony on cross-examination was a "serious mistake."[32]

The court again discussed whether the plaintiff waived the privilege by calling a treating physician to testify in *Knighton v. Knighton*.[33] In *Knighton*, the plaintiff called his physician and he testified about his diagnosis of the plaintiff.[34] The defendant subsequently moved to introduce the medical records the physician used while testifying and the plaintiff objected.[35] The Mississippi Supreme Court held that

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[31] *Id.* at 366-67. The court stated that the issue was whether a criminal defendant who pled insanity waived his privilege only as to issues of insanity or whether he also waived the privilege regarding information about the commission of the crime. *Id.* at 366. *See also* Ashley v. State, 423 So. 2d 1311, 1314-15 (Miss. 1982) (holding criminal defendant waived privilege by calling physician and failing to object when physician revealed results of blood test on cross-examination). The defendant argued that allowing the physician to disclose information about the commission of the crime learned from treating the defendant amounted to forcing the defendant to testify against himself. *Tarrants*, 236 So. 2d at 367. The court appreciated the creativity of that argument but did not address the issue because there was no dispute about whether the defendant planted the bomb. *Id.*

[32] *Tarrants*, 236 So. 2d at 368 (Rodgers, J., concurring). Justice Rodgers thought the admission of the physician's testimony to prove the commission of the crime was a "serious mistake" because the defendant called the physician to testify only on the issue of his sanity. *Id.* (Rodgers, J., concurring). He further stated that it was a mistake because insane people might fabricate exploits while being treated. *Id.* (Rodgers, J., concurring). Justice Rodgers also noted that allowing a physician to testify about what a patient told him about the commission of the crime would have a "chilling effect" on defendants who need to plead insanity. *Id.* (Rodgers, J., concurring).

[33] 253 So. 2d 846 (Miss. 1971).

[34] *Knighton*, 253 So. 2d at 847. The physician had the plaintiff's medical record in his possession when he testified. *Id.* The court stated that information about the plaintiff's diagnosis could only have come from those medical records. *Id.*

[35] *Id.* The court stated that the medical records contained information helpful to the defendant. *Id.* The plaintiff argued that laws requiring the state to maintain medical records did not abolish the physician-patient privilege. *Id.* The court had previously held that the privilege did not apply to the law requiring the state to keep medical records. Life & Casualty Ins. Co. v. Walters, 177 So. 47, 49-50 (Miss. 1937).

the plaintiff waived his medical privilege regarding the records when he called his physician who used them during his testimony.[36]

E. Effect of Displaying Injuries to the Jury

The court then addressed whether a plaintiff waived his medical privilege by exhibiting his injuries to the jury in *Fishboats, Inc. v. Welzbacher*.[37] In *Fishboats*, the plaintiff injured his knee while working on a fishing boat operated by the defendant.[38] During his testimony, the plaintiff exposed his injured knee to the jury.[39] The defendant then tried to introduce medical records concerning a concussion the plaintiff may have suffered prior to the accident.[40] The trial court excluded the records.[41] On appeal, the Mississippi Supreme Court held that the plaintiff waived his medical privilege only to issues

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[36] *Knighton*, 253 So. 2d at 847. The court found that the trial court judge was not manifestly wrong when he ruled that the plaintiff waived his privilege. *Id.* *See* City of Laurel v. Upton, 175 So. 2d 621, 625 (Miss. 1965) (holding defendant had right to cross-examine plaintiff's treating physician about records used by physician to answer questions under direct examination). *See also* Reynolds v. West, 115 So. 2d 742, 744 (Miss. 1959) (holding no error in admitting plaintiff's hospital records and expert testimony based on those records because testimony was not based on examination of patient).

[37] 413 So. 2d 710 (Miss. 1982)

[38] *Fishboats, Inc.*, 413 So. 2d at 712. The plaintiff injured his knee when an ice chest cover blew into his face and he lost his balance and fell. *Id.* Four different physicians treated the plaintiff. *Id.* One of the physicians testified that the accident completely disabled the plaintiff and all the medical experts agreed that he could never work as a seaman again. *Id.* at 713.

[39] *Id.* at 714. Physicians removed the meniscus from the plaintiff's knee following the accident. *Id.* at 712.

[40] *Id.* at 713. On December 23, 1978, just six days before the accident on the boat, the Singing River Hospital emergency room admitted the plaintiff to treat him for a "contusion to the lateral parietal area and to the superior portion of the left ear." *Id.* When he was admitted, the plaintiff had a blood alcohol content of .4%. *Id.* The plaintiff left the hospital prior to treatment and against medical advice. *Id.* The defendant wanted to introduce records concerning the plaintiff's visit to the emergency room either to show the plaintiff was more susceptible to falls or to impeach him since the plaintiff denied he was injured or hospitalized on that date. *Fishboats, Inc.*, 413 So. 2d at 713.

[41] *Id.* The trial court excluded the records on grounds they were privileged, immaterial, and irrelevant. *Id.*

concerning injuries to the part of his body he exhibited to the jury.[42]

F. Effect of Filing an Action for Injuries

The court first interpreted Mississippi Rule of Evidence 503 in *Sessums v. McFall*.[43] In *Sessums*, a personal injury action stemming from an automobile collision, the trial court permitted the plaintiff's treating physician to testify that the plaintiff told him he caused the accident.[44] The plaintiff lost, appealed and asserted that the trial court erred in admitting the physician's testimony.[45] The Mississippi Supreme Court reversed and remanded, holding that the trial court should have excluded the physician's testimony because it was privileged information.[46] The court concluded that the plaintiff only waived the privilege as it concerned his injuries and expenses incurred for treatment.[47]

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[42] *Id.* at 714. The court affirmed the trial court's ruling excluding the medical records from Singing River Hospital. *Id. See* Dennis v. Prisock, 181 So. 2d 125, 128 (Miss. 1965) (holding plaintiff waived privilege by showing jury scar on her back and testifying in detail about injuries and communications with treating physicians). The court stated that the connection between the December 23 incident and the boating accident was extremely tenuous. *Fishboats*, 413 So. 2d at 714.

[43] 551 So. 2d 178 (Miss. 1989).

[44] *Sessums*, 551 So. 2d at 179-80. The physician testified that the plaintiff told him he pulled out in front of the car that hit him. *Id.* Only the principals saw the accident. *Id.* at 179. The plaintiff denied telling his physician he caused the accident. *Id.* at 181.

[45] *Id.* The defendants argued that the plaintiff waived the privilege when he introduced the bill from the physician into evidence and when he answered questions under cross-examination about what he told his physician. *Id.* at 180.

[46] *Id.* at 180-81. The court based its ruling on their interpretation of Rule 503(f). *Id.* at 181. Rule 503 limited the waiver of the medical privilege to physical, mental and emotional conditions placed in issue by the plaintiff. MISS. R. EVID. 503(f) (1996). The court reversed because the trial court committed prejudicial error by allowing the testimony. *Sessums*, 551 So. 2d at 181.

[47] *Sessums*, 551 So. 2d at 181. The court held that the plaintiff did not waive the privilege concerning communications to his physician regarding the cause of the accident. *Id.* The court considered the information privileged because it was necessary for a complete diagnosis. *Id.* The court also stated that the plaintiff did not waive the privilege when he testified on cross-examination or when he introduced medical bills into evidence. *Id.* (citing Coca Cola Bottling Works v.

G. Rule 503(f) and Ex Parte Contacts of a Plaintiff's Treating Physician by Defense Counsel

The Mississippi Supreme Court had not decided the permissibility of ex parte[48] contacts of a plaintiff's treating physician by defense counsel.[49] A number of courts have permitted ex parte contacts.[50] Some courts have permitted ex parte contacts only with limitations.[51] Other courts have completely prohibited ex parte contacts.[52]

Simpson, 130 So. 479, 481 (Miss. 1930)).

[48] BLACK'S LAW DICTIONARY 576 (6th ed. 1990). Ex parte is defined as "done for, in behalf of, . . . one party only." *Id.*

[49] CAROLYN STATON, MISSISSIPPI EVIDENCE 112 (3rd. ed. 1989). One commentator noted that rules of discovery, not rules of evidence, should determine the permissibility of ex parte contacts. *Id.* at 113. The rules of evidence did not authorize ex parte contacts. MISS. R. EVID. 503(f) (1995). Another commentator stated that the rules of civil procedure were not intended to dictate the exclusive method of discovery. William E. Whitfield, III, *Mississippi Medical Privilege: Blessing or Curse?*, 12 MISS. C. L. REV. 461, 489-90 (1992).

[50] Brandt v. Pelican, 856 S.W.2d 658, 662 (Mo. 1993). The *Brandt* court noted that the Missouri medical privilege was testimonial and pertained only to disclosures made "in court or by formal discovery." *Brandt*, 856 S.W.2d at 661. *See* Doe v. Eli Lilly & Co., Inc., 99 F.R.D. 126, 128 (D.D.C. 1983) (stating neither party in lawsuit had exclusive access to witnesses). Other courts permitted ex parte contacts to further the aims of efficiency in litigation, early evaluation of claims and fairness ensured by equality of access to information. John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 458-59 nn.94-99 (1994).

[51] Steinberg v. Jensen, 534 N.W.2d 361, 371 (Wis. 1995). The *Steinberg* court permitted ex parte contacts but prohibited ex parte "discovery," where the physician and defense counsel engage in "private question and answer sessions." *Steinberg*, 534 N.W.2d at 371. One court permitted ex parte contacts only if defense counsel notified the plaintiff of the time, place and scope of the interview. Stempler v. Speidell, 495 A.2d 857, 864 (N.J. 1985).

[52] Horner v. Rowan, 153 F.R.D. 597, 601 (S.D. Tex. 1994). The *Horner* court prohibited ex parte interviews unless the plaintiff unconditionally authorized them. *Horner*, 153 F.R.D. at 601. *See* Perkins v. United States, 877 F.Supp. 330, 333-34 (E.D. Tex. 1995) (holding that, absent plaintiff's express consent, defense counsel may not engage in ex parte interviews with a non-party treating physician). Some courts prohibited ex parte contacts because of the danger that physicians might inadvertently disclose privileged information and the danger that defense counsel might improperly sway the physician's testimony. Wm. Jeffrey Maloney, Note, *Ex Parte Communication Between Physicians and Attorneys: A Change of Course*, 62 UMKC L. REV. 405, 418 n.119 (1993). Other courts prohibit-

II. SCOTT V. FLYNT

A. *Opinion of the Court*

In Scott v. Flynt[53], the Mississippi Supreme Court held that, in a medical malpractice action, the plaintiff waived his medical privilege only to physical, mental or emotional conditions placed at issue.[54] The court also limited discoverable medical information in any personal injury action to relevant medical history.[55] The court warned that allowing an unconditional waiver in medical malpractice actions would jeopardize the sanctity of the physician-patient relationship.[56] Finally, the court ruled that trial courts should not force plaintiffs to completely waive their medical privilege.[57]

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ed ex parte contacts out of concern for patients' privacy, the physician's potential tort liability for disclosing privileged information and the fiduciary duty physicians owe to patients. Daniel P. Jones, Annotation, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R. 4TH 714, 717-718 (1986).

[53] No. 92-IA-00397-SCT, 1996 WL 183459 (Miss. Apr. 18, 1996).

[54] *Scott*, 1996 WL 183459, at *5. The court relied on *Sessums*, where the court held that in a personal injury suit a plaintiff waived his medical privilege only to information relevant to the injuries he placed in issue. *Id.* at *3 (citing Sessums v. McFall, 551 So. 2d 178, 180 (Miss. 1989)). The court acknowledged that Rule 503(d)(3) did not provide a privilege in medical malpractice actions. *Id.* at *5. The court noted that although the comment to subsection (f) indicated the waiver's impact would be most evident in personal injury suits, the waiver was "not so limited." *Id.* at *5 (citing MISS. R. EVID. 503(f) comment). The court concluded that the privilege should be uniform in all actions because the comment to subsection (f) did not specifically exclude medical malpractice actions. *Id.*

[55] *Id.* The court admitted that Rule 503(d)(3) did not refer to relevant information and ruled "based upon common sense of fair play and substantial justice." *Id.* The court stated that relevant medical history might include past negligent acts of the physician or injuries placed in issue by the plaintiff. *Id.* The court suggested that parties decide between themselves what information is relevant. *Id.* at *6. If parties can not decide what is relevant, the court stated that the trial court should determine relevance. *Scott*, 1996 WL 183459, at *6. The court noted that this method of determining relevancy sufficiently protected the patient's right to confidentiality. *Id.* at *7.

[56] *Id.* at *6. The court also noted that a complete waiver might allow a defendant to possess embarrassing information which would likely be inadmissible on grounds of irrelevancy. *Id.* The court also recognized that plaintiffs might undeservedly recover by hiding behind the privilege. *Id.* The court concluded that the right of a patient to be secure in the confidence of his physician was more important than a defendant's need for complete information and the public's need for judicial expediency. *Id.* at *7.

[57] *Id.* at *6. The court stressed that "[s]uch disregard for a patient's

The court next determined that Rule 503 operated to exclude evidence garnered from ex parte contacts.[58] The court feared that allowing ex parte contacts would lead to inadvertent disclosures of privileged information by physicians.[59] The court stated that formal discovery was the best method for obtaining information while protecting the plaintiff's privacy.[60] The court then noted that, because Rule 503(f) did not expressly authorize ex parte contacts, they could prohibit them.[61] Finally, the court held that all evidence obtained from ex parte contacts was inadmissible.[62]

B. Concurring Opinion

Justice Banks stated in his concurring opinion that the rules of evidence did not forbid ex parte contacts.[63] He noted that otherwise relevant information should not be excluded simply because it was obtained from ex parte contacts.[64]

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rights . . . will not be tolerated . . . ." *Id.*

[58] *Id.* at *10. The court noted that Rule 503 and the rules of civil procedure did not prohibit ex parte contacts because they only governed conduct in court. *Id.* at *8.

[59] *Scott*, 1996 WL 183459, at *7. The court noted that physicians were unskilled in differentiating between relevant and privileged information. *Id.* (citing Horner v. Rowan, 153 F.R.D. 597, 601-602 (S.D. Tex. 1994)). The court also recognized the danger that physicians could be held liable for innocent disclosures of privileged information. *Id.* (citing Horner v. Rowan, 153 F.R.D. 597, 601-602 (S.D. Tex. 1994)). The court stated that requiring the presence of plaintiff's counsel while the treating physician is questioned ensured pertinent information would be collected and guaranteed that the plaintiff's attorney could protect the patient's rights. *Id.* (citing Horner v. Rowan, 153 F.R.D. 597, 601-602 (S.D. Tex. 1994)).

[60] *Id.* The court noted that only the method of gathering, not the substance, of the information changed. *Id.* (citing Horner v. Rowan, 153 F.R.D. 597, 601-602 (S.D. Tex. 1994)).

[61] *Id.* at *8. The court concluded Rule 503(f) was not expressly limited to personal injury actions so ex parte contacts could be prohibited in medical malpractice actions. *Id.*

[62] *Id.* at *9. The court did not address the appellant's constitutional claims since it decided the case on statutory construction grounds. *Id.* at *10. The court rejected the defendant's claim that prohibiting ex parte contacts violated the attorney work-product doctrine. *Id.*

[63] *Id.* (Banks, J., concurring). Justice Banks also noted that the rules did not sanction ex parte contacts. *Id.* (Banks, J., concurring).

[64] *Scott*, 1996 WL 183459, at *10 (Banks, J., concurring). Justice Banks stated

III. DISCUSSION

In *Scott v. Flynt*, the Mississippi Supreme Court adds another layer of protection to the physician-patient privilege.[65] Limiting discoverable evidence in a medical malpractice action to relevant medical history will help prevent the disclosure of embarrassing personal information.[66] Determining the relevance of medical information is difficult and the court's tone may lead trial judges to exclude possibly relevant evidence which might violate the privilege.[67] By limiting access to a plaintiff's medical information, the court also creates the possibility that medical malpractice defendants might not discover evidence which could clear them of wrongdoing.[68]

The court also strengthens the physician-patient privilege by holding inadmissible evidence obtained through ex parte contacts.[69] The court's holding may make it harder for defen-

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that the majority's intentions were noble yet insupportable by the rules of evidence. *Id.* (Banks, J., concurring). He also stated that a physician's ethical obligations sufficiently prevented the disclosure of privileged information. *Id.* (Banks, J., concurring). He concluded that no "evidentiary barrier" needed to be created to protect the disclosure of privileged information in ex parte interviews. *Id.* (Banks, J., concurring).

[65] *See supra* notes 54-64 and accompanying text. By extending the conditional waiver to medical malpractice actions and excluding evidence obtained through ex parte contacts, the court makes it more difficult for defendants to obtain privileged information. *See supra* notes 54-64 and accompanying text. The court also notes that a patient's right to privacy outweighs the public's interest in judicial expediency. *See supra* note 56 and accompanying text.

[66] *See supra* notes 55-56 and accompanying text. The court states that with an unconditional waiver the defendant could possess irrelevant embarrassing information about the plaintiff which would be inadmissible. *See supra* notes 55-56 and accompanying text.

[67] *See supra* notes 55-57 and accompanying text. Although the court suggests that opposing counsel resolve relevancy issues between themselves, many delicate issues will likely have to be determined by judicial hearing. *See supra* notes 55-56 and accompanying text.

[68] *See supra* notes 44-47, 56 and accompanying text. The court recognizes that plaintiffs might be able to conceal previous injuries which could have bearing on present injuries by asserting the privilege. *See supra* note 56 and accompanying text. For example, in *Sessums*, the court excluded an admission of fault because the waiver was limited to the physical injuries the plaintiff placed in issue. *See supra* notes 44-47 and accompanying text.

[69] *See supra* notes 58-62 and accompanying text. The decision effectively ex-

dants to gather facts by discouraging interviews of a plaintiff's treating physician outside the presence of counsel.[70] Defendants may find it more difficult to evaluate claims if they can not quickly and freely investigate them.[71] Finally, the court does not address the potential problem of excluding otherwise admissible evidence discovered via deposition if it was initially obtained from ex parte contacts.[72]

IV. CONCLUSION

The *Scott* decision fortifies the physician-patient privilege in Mississippi by limiting the waiver in medical malpractice actions to conditions placed in issue by the plaintiff. It further protects patients against the disclosure of potentially embarrassing information. While it underscores Mississippi's commitment to the sanctity of the physician-patient relationship, it may also present problems for attorneys defending medical malpractice actions.

Frank Garrison

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tends the scope of the privilege, a rule of evidence, outside the courtroom by rendering impotent any evidence obtained from ex parte contacts. *See supra* notes 58-62 and accompanying text. Additionally, limiting the defendant's methods of obtaining information decreases the likelihood that privileged information will be inadvertently disclosed. *See supra* note 59 and accompanying text.

[70] *See supra* notes 59-60 and accompanying text. The ruling may allow plaintiff's counsel to sift through complicated facts and prepare objections to potentially harmful questions well in advance. *See supra* notes 59-60 and accompanying text.

[71] *See supra* note 50 and accompanying text. Jurisdictions permitting ex parte contacts note that ex parte contacts allow defense counsel to evaluate their claims more quickly, easily and efficiently. *See supra* note 50 and accompanying text.

[72] *See supra* notes 50, 55-56, and 58-60 and accompanying text. The court acknowledges, in the context of extending the waiver, the danger of judges excluding otherwise relevant evidence due to a plaintiff hiding behind the privilege. *See supra* note 56 and accompanying text. A plaintiff might also be able to abuse the privilege if a judge is forced to exclude otherwise admissible relevant evidence merely because it was originally discovered from ex parte contacts. *See supra* note 58-60 and accompanying text.

CONSTITUTIONAL LAW—UNITED STATES SUPREME COURT PLACES LIMITS ON PUNITIVE DAMAGES

Dr. Ira Gore purchased a black BMW sports sedan for $40,750.88 from a dealer in Birmingham, Alabama.[1] Dr. Gore took the car to an independent detailer who notified him of the repainted sections on the car.[2] Dr. Gore then filed suit against BMW of North America alleging fraud through suppression of a material fact.[3]

After trial in an Alabama Circuit Court, a jury found BMW liable for compensatory damages of $4000 and punitive damages of $4,000,000.[4] The Alabama Supreme Court rejected BMW's claim that the punitive damage award was excessive, but reduced punitive damages to $2,000,000 because the jury

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[1] BMW of North America, Inc. v. Gore, ____ U.S.____, 116 S. Ct. 1589, 1593 (1996). The purchase occurred in January 1990 from an authorized BMW dealer. *BMW*, 116 S. Ct. at 1593. Dr. Gore drove the car for nine months without detecting a flawed appearance. *Id.*

[2] *Id.* Mr. Slick, the owner of "Slick Finish", detected that the car had been repainted. *Id.* BMW did not inform Dr. Gore that the BMW preparation center had repaired the hood, trunk, top, and quarter panels of the car. *Id.* at 1593 n.1. BMW had adopted a nationwide policy of not informing new owners of damage during manufacture or transportation if the cost of repair was less than 3% or the suggested retail price of the vehicle. *Id.* at 1593. The cost of repainting Dr. Gore's car equaled $601.87, or 1.5% of the suggested retail price. *BMW*, 116 S. Ct. at 1593.

[3] *Id.* BMW of North America was the American distributor of BMW automobiles. *Id.*

[4] *Id.* at 1593-94. The jury based the compensatory award on the testimony that the repairs caused a 10% loss in original value of the car. *Id.* at 1593. The jury also determined that BMW's non-disclosure policy constituted "gross, oppressive, or malicious" fraud. *Id.* at 1594 (citing *ALA. CODE* §§ 6-11-20, 6-11-21 (1993)). The jury multiplied the compensatory damage amount by 1000, the approximate number of repainted cars sold in the nation, to arrive at the amount of punitive damages awarded. *Id.* at 1593. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding that the award was not excessive. *BMW*, 116 S. Ct. at 1594.

had improperly computed the award.[5]

On appeal, the United States Supreme Court held: Reversed and remanded.[6] The Court held that where a low level of reprehensibility of conduct and a high ratio of award to actual harm to purchaser occurred, the award of punitive damages was grossly excessive.[7]

I. Related Law

A. Early History of Punitive Damage Law

In the early case of *Day v. Woodworth*,[8] The United States Supreme Court acknowledged the availability of punitive damages in an action of trespass.[9] The Court held that in trespass actions, under certain circumstances, courts could permit juries to add a punitive damage award over and above the compensatory award.[10] The majority reasoned that it was

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[5] *Id.* at 1594-95. The Alabama Supreme Court reduced the punitive damage award because the jury multiplied Dr. Gore's compensatory damages by the number of similar instances in other jurisdictions. *Id.* at 1595.

[6] *BMW*, 116 S. Ct. at 1604. The United States Supreme Court held that where the conduct of a distributor outside a state is lawful, a state court can not have considered that conduct in assessing an award of punitive damages. *Id.* at 1598.

[7] *Id.* at 1601-03. The Court stated that the jury should not have factored BMW's lawful conduct of not disclosing repairs outside Alabama into the punitive damage award. *Id.* at 1598. The Court also held that in light of the low level of reprehensibility of BMW's conduct and the 500 to 1 ratio of award to actual harm to purchaser, the award of $2,000,000 punitive damages was grossly excessive. *Id.* at 1601-03.

[8] 54 U.S. (13 How.) 363 (1851).

[9] *Day*, 54 U.S. (13 How.) at 363, 371. Defendants entered upon Day's property without permission and removed portions of his dam which they found injurious to their own property. *Id.* at 363. Day then brought a trespass action against the defendants. *Id.*

[10] *Id.* at 371-73. The circumstances to which the Court referred exist when the injury to the plaintiff has been "wanton and malicious, or gross and outrageous." *Id.* at 371; *see also* Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 492 (1875) (holding punitive damages may be imposed as circumstances require); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 2, at 9-10 (4th ed. 1971) (stating actions of defendant if willful and wanton may lead to punitive damages). If the defendant did not act willfully or maliciously, a court may consider bad faith as a basis for assessing punitive damages. Teese v. Huntingdon, 64 U.S. (23 How.) 2, 9 (1859); *see also* DAN B. DOBBS, HANDBOOK OF THE LAW OF

a well established principle of common law that in all tort actions a jury may impose punitive damages upon the defendant, considering the character of the defendant's offense rather than the plaintiff's actual need for compensation.[11] The United States Supreme Court has recently reexamined the law of punitive damages, however, possibly due to concerns of basic fairness in the law.[12]

B. United States Supreme Court Review of Statutory Awards

In *Waters-Pierce Oil Co. v. Texas*,[13] the United States Supreme Court considered the constitutionality of a statutory fine imposed upon a foreign corporation.[14] The Court held that the fine imposed did not classify as a grossly excessive penalty[15] The Court reasoned that despite its size, the fine assessed fell within the limited bounds of the statute and was,

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REMEDIES, § 3.9, at 205 (1973) (stating punitive damages may be assessed after considering conduct and mental state of defendant).

[11] *Day*, 54 U.S. (13 How.) at 371. The common law authority to which the Court referred originated in Eighteenth Century England. Dorisey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12 (1982). American courts adopted their treatment of punitive damages from the English authorities. Genay v. Norris, 1 Bay 6 (S.C. 1784); *see also* Lake Shore & Michigan S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (recognizing awarding of punitive damages as well settled doctrine); Denver & Rio Grande Ry. v. Harris, 122 U.S. 597, 609 (1887) (holding jury has a right to award punitive damages).

[12] David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 401 (1994). The recent growth in multi-million dollar punitive damage awards has also factored into the Courts recent analysis of the constitutionality of these awards. *Id.*

[13] 212 U.S. 86 (1909).

[14] *Waters-Pierce*, 212 U.S. at 97. A jury found Waters-Pierce Oil Company guilty of violating state anti-trust laws and assessed penalties of $1,623,500. *Id.* at 96-97. The defendant argued that the excessiveness of the fine constituted a taking of property without due process. *Id.* at 111.

[15] *Id.* at 112. The United States Supreme Court noted that it could have only interfered in this case if the fine imposed was so grossly excessive as to violate due process of law. *Id.* at 111; *see also* Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1912) (stating power of state to assess fines limited); Seaboard Air Lines Ry. v. Seegers, ____ U.S.____, 28 S. Ct. 28, 30 (1907) (acknowledging substantive limits on assessment of statutory fine); Coffey v. Harlan County, 204 U.S. 659, 662-63 (1907) (holding constitutional concerns only limit on decision of state court).

therefore, constitutional.[16] Recent decisions of the United States Supreme Court have brought this substantive limit issue out the area of statutory fines and into discussions of punitive damages.[17]

C. *The Eighth Amendment as a Limit on Punitive Damages*

In *Browning-Ferris Industr. of Vermont, Inc. v. Kelco Disposal, Inc.*,[18] the United States Supreme Court rejected an Eighth Amendment Excessive Fines Clause challenge to a punitive damages award of $6,000,000.[19] Kelco argued that Browning-Ferris Industries violated Vermont's tortious interference law and urged the jury to award punitive damages.[20] The Court held that in cases concerning private parties, the Excessive Fines Clause of the Eighth Amendment did not limit punitive damages.[21] The Court reasoned that the

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[16] *Waters-Pierce*, 212 U.S. at 112. As explained in a later case, the Court reasoned that this penalty was not so unreasonable and oppressive as to violate due process. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919).

[17] Rita K. Franco, TXO Production Corporation v. Alliance Resources Corporation: *United States Supreme Court's Equivocal Reply to the Punitive Damages Predicament*, 27 CONN. L. REV. 735, 739 (1995). Scholars have claimed that analysis of the case precedent in the area of statutory review has exemplified the blurry line between constitutionality and unconstitutionality. *Id.*

[18] 492 U.S. 257 (1989).

[19] *Browning-Ferris Industries*, 492 U.S. at 275. Kelco filed a suit that claimed Browning-Ferris violated aspects of anti-trust and tort law. *Id.* at 261. Kelco argued Browning-Ferris Industries engaged in an illegal predatory pricing strategy. *Id.*

[20] *Id.* A jury found for Kelco and awarded $51,146 in compensatory damages, and $6,000,000 in punitive damages on the tortious interference claim. *Id.* at 262.

[21] *Id.* at 275. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The Court had previously left open the possibility that the Eighth Amendment might apply in some civil cases. Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977); *see also* Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1433 (1987) (stating current theories of legal community concerning punitive damages and Eighth Amendment). Some precedent existed, for example, supporting the idea that certain constitutional rights associated with criminal actions applied in civil cases. United States v. Beane, 960 F.2d 200, 206-07 n.5 (1st Cir. 1992); *see also* United States v. United States Coin

Eighth Amendment applied only when the government prosecuted the action or had a claim to a portion of the damage award.[22] Although some scholars have argued that the Eighth Amendment limited punitive damages, the more appropriate and applicable limitations arose in later cases.[23]

D. The Rise of Due Process Clause Limitations on Punitive Damages

In *Pacific Mutual Life Ins. Co. v. Haslip*,[24] the United States Supreme Court considered the limitations of the Due Process Clause on punitive damages.[25] Haslip alleged that Pacific Mutual Life committed a fraudulent act by continuing to accept insurance premium payments from Haslip after expiration of the insurance policy.[26] The Court held that the common-law method for assessing punitive damages was not unconstitutional on its face, and that the punitive damages recovered by Haslip did not violate due process.[27] With every

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& Currency, 401 U.S. 715, 721-22 (1971) (applying Fifth Amendment privilege in some forfeiture cases). *But see Beane*, 960 F.2d at 206-07 (refusing to acknowledge forfeiture case precedent as material).

[22] *Browning-Ferris Industries*, 492 U.S. at 264. Other courts similarly followed this line of reasoning. *See, e.g.*, United States v. 6250 Ledge Road, 943 F.2d 721, 727 (7th Cir. 1991) (holding Eighth Amendment generally inapplicable to civil actions).

[23] *Bittle*, *supra* note 21, at 1470. This author argued for a more functional approach where courts treated punitive damages as fines and applied Eighth Amendment limitations. *Id.* at 1433.

[24] 499 U.S. 1 (1991).

[25] *Haslip*, 499 U.S. at 7-8; *see also* Owen, *supra* note 12, at 401. The Fourteenth Amendment of the United States Constitution reads in part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[26] *Haslip*, 499 U.S. at 6. The lower court entered judgment for Haslip for $200,000 in compensatory damages, and $840,000 in punitive damages. *Id.* at 7 n.2. The United States Supreme Court allowed review of the recovery due to of the long-standing debate on punitive damages. *Id.* at 8. *Compare* Fay v. Parker, 53 N.H. 342, 382 (1872) (claiming punitive damages as monstrous heresy) with Luther v. Shaw, 147 N.W. 18, 19-20 (Wis. 1914) (stating punitive damage law was outgrowth of English love of liberty).

[27] *Haslip*, 499 U.S. at 19, 22. The Court had recently expressed concerns about the constitutionality of certain punitive damage awards; yet, it had not

federal and state court ruling that the common law method for assessing punitive damages did not violate notions of due process, the Court reasoned that it could not hold the method so unfair as to violate the Constitution.[28] The Court also pointed to questions of reasonableness and adequate guidance that might play a role in a constitutional analysis and subsequent limitation of punitive damage awards.[29]

E. Review of Punitive Damages in Light of Haslip

In *Eichenseer v. Reserve Life Insurance Company*,[30] the Fifth Circuit reviewed the constitutionality of a punitive damage award in light of the United States Supreme Court decision in *Haslip*.[31] The Fifth Circuit held that the punitive damage award, which was 500 times greater than the compensatory award, did not violate the due process requirement of the Fourteenth Amendment.[32] The court reasoned that the

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ruled on specific due process limitations. *Id.* at 9; *see* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79-80 (1988) (recognizing seriousness of due process issue regarding punitive damage award review but reserving decision for later case); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (acknowledging importance of due process issue with regard to punitive damages); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (criticizing juries ability to assess damages without bearing to actual harm caused).

[28] *Haslip*, 499 U.S. at 17. The Court stated it was inappropriate to say that the long-standing recognition of punitive damages provided a shield against claims of unconstitutionality. *Id.* at 18; *see* Williams v. Illinois, 399 U.S. 235, 239 (1970) (stating "judicial adherence" through time does not protect idea from constitutional attack). The Court also reasoned that it could not hold that the rules concerning punitive damages in Alabama did not logically advance a legitimate interest of the state. *Haslip*, 499 U.S. at 14.

[29] *Id.* at 18. The Court also indicated that due process does require that juries not be given unbridled discretion in punitive damage administration. *Id.*

[30] 934 F.2d 1377 (5th Cir. 1991).

[31] *Eichenseer*, 934 F.2d at 1378-79 (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, *passim* (1991)). Reserve Life Insurance Company refused to pay the valid health insurance claim of Eichenseer. *Id.* at 1379. Eichenseer filed suit and recovered $1000 in compensatory damages and $500,000 in punitive damages. *Id.* at 1380. The United States Supreme Court, after vacating the original decision of the Fifth Circuit, remanded the case for further proceedings due to its recent decision on this matter. *Id.*

[32] *Id.* at 1384. The Fifth Circuit noted that a constitutionally acceptable punitive damage award required that circumstances surrounding the case point to the

criteria outlined by *Haslip* afforded the appellate court a narrow channel of review.[33] Although *Eichenseer* and other lower court decisions attempted to apply the tests set forth in *Haslip*, many critics claimed problems of clarity and definitiveness still existed within these standards.[34]

F. General Concerns of Reasonableness as a Test for Punitive Damage Awards

In *TXO Production Corp. v. Alliance Resources Corp.*,[35] a plurality of the Supreme Court established general concerns of reasonableness as the applicable test to determine whether an award violated due process.[36] The Court held that the punitive damage award, which was 526 times greater than compensatory damages, was not so grossly excessive that it violated the Fourteenth Amendment.[37] The Court reasoned that

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reasonableness of the award, and that procedural constraints existed to limit the discretion of the jury. *Id.* at 1381-82; *see also* Watson v. Shell Oil Co., 979 F.2d 1014, 1020 (5th Cir. 1992) (noting requirement of reasonableness based on defendant's conduct as well as compensatory award).

[33] *Eichenseer*, 934 F.2d at 1382. In analyzing the reasonableness requirement, the Fifth Circuit stated that as long as some evidentiary support existed for the award, it met the requirement of reasonableness. *Id.* at 1382. The court also reasoned that the wealth of the defendant also affected the determination of reasonableness. *Id.* at 1383.

The Fifth Circuit noted that jury discretion in awarding punitive damages can not go unbridled. *Id.* at 1384. The court reasoned that Mississippi law, appellate review, and proper jury instructions appropriately limited the discretion of the jury in this case. *Id.* at 1385-86.

[34] John L. Meredith & Brian P. Casey, *Taking Cover: Preserving Error When Hit with a Claim for Punitive Damagess*, 47 BAYLOR L. REV. 923, 937-39 (1995). Courts varied greatly in their application of the reasonable relationship requirement. *Id.*

[35] 509 U.S. 443 (1993).

[36] *TXO*, 509 U.S. at 458. Alliance Resources presented evidence that TXO attempted to exclude Alliance from millions of dollars in oil and gas rights. *Id.* at 447-50.

[37] *Id.* at 462. The jury awarded Alliance $19,000 in compensatory damages and $10,000,000 in punitive damages. *Id.* at 451. TXO argued that the punitive damage award violated the Due Process Clause of the Fourteenth because of the lack of guidance afforded to the jury, the inadequate review of the lower courts, and because it had no advance notice that such a large award was possible. *Id.* The United States Supreme Court held that the procedure followed by the trial

the punitive damage award must have possessed some reasonable relationship to compensatory damages, and considered the potential harm of the defendant's conduct as a factor in that relationship.[38] Although the *TXO* decision clarified some of the standards of *Haslip*, the Court again failed to adopt more defined standards along with an objective test for examining punitive damages.[39]

II. BMW OF NORTH AMERICA, INC. V. GORE

A. Opinion of the Court

In *BMW of North America, Inc. v. Gore*,[40] the United States Supreme Court addressed the issue of whether an award of punitive damages was grossly excessive considering the low level of reprehensibility of the defendant's conduct and the 500 to 1 ratio between the award and actual harm.[41] The

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court with regard to punitive damages was not unconstitutional. *Id.* at 463.

[38] *Id.* at 462-64. Although the Court did not draw an absolute distinction between constitutionally acceptable and unacceptable awards, all nine justices have now held that there are some Fourteenth Amendment limitations on punitive damage awards. Owen, *supra* note 12, at 401. In *Honda Motor Co., Ltd. v. Oberg*, for example, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment placed a substantive limit on the size of punitive damage awards. Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S. Ct. 2331, 2335 (1994). The Court mandated that defendants have opportunity for judicial review of punitive damage awards. Owen, *supra* note 12, at 404. The Court noted that judicial review of awards had been a long-standing safeguard against unconstitutionality. *Oberg*, 114 S. Ct. at 2335; *see* Jones v. Sparrow, 101 Eng. Rep. 144, *passim* (K.B. 1793) (granting new trial for excessive damages); Sharpe v. Brice, 96 Eng. Rep. 557, *passim* (C.P. 1774) (recognizing availability of Court to grant new trial due to excessive damages). In this decision, a majority of the Court, for the first time, held that the Due Process Clause did impose substantive limits on punitive damage awards. Mark McLaughin, *Addressing the Threat of Punitive Damages Claims in Franchise and Dealer Litigation*, 15 FRANCHISE L.J. 10, 10 (1995).

[39] David F. Cutter, Note, TXO Production Corp. v. Alliance Resources Corp.: *A Failure to Create True Constitutional Protection Against Excessive Punitive Damages*, 44 CATH. U. L. REV. 631, 673 (1995). As a result of the Court's failure to establish a more objective test, it looked as if courts could return to their earlier actions of barely exercising any control over the juries' punitive damage decisions. Owen, *supra* note 12, at 404.

[40] ___ U.S. ___, 116 S. Ct. 1589 (1996).

[41] *BMW*, 116 S. Ct. at 1598. The United States Supreme Court also discussed

Court first held that a state court may not consider the lawful conduct of a distributor outside a state while determining punitive damages.[42] The Supreme Court then acknowledged that the punitive damage award of $2,000,000 was grossly excessive.[43] The Court based its holding on three definitive guideposts: the degree of reprehensibility of non-disclosure; the disparity between the actual or potential harm suffered by the plaintiff and the punitive award; and, the difference between the punitive award and possible criminal penalties.[44] The Court concluded that based on principles of state sovereignty and the application of the three-pronged test, the punitive damages award imposed on BMW was grossly excessive

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whether a state could consider the lawful conduct of a distributor outside of the state in making an award of punitive damages. *Id.* at 1597.

[42] *Id.* Justice Stevens, writing for the Court, noted that states have a legitimate state interest in imposing punitive damages in order to punish unlawful conduct and deter its repetition. *Id.* at 1595 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)). The Court then recognized the legitimacy of Alabama's interest in protecting its citizens from deceptive trade practices by encouraging disclosure of presale repairs. *Id.* at 1595-96. The Court acknowledged, however, that all states do not protect their citizens in the same manner. *Id.* at 1595. Due to this diversity, the Supreme Court held that it was clear that one state acting on its own could not impose its policy on neighboring states. *BMW*, 116 S. Ct. at 1596-97 (citing Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881)).

[43] *Id.* at 1598. Justice Stevens eluded to basic notions of fairness which dictated that a state must have placed defendant on some notice of the severity of punishment it could possibly receive. *Id.*

[44] *Id.* Each of the guideposts lead to the notion that the defendant had received adequate notice of the possibility of the severity of the punitive award. *Id.* The Court noted that reprehensibility of defendant's conduct was possibly the most important factor in assessing a punitive award. *Id.* at 1599 (citing *Day v. Woodworth*, 54 U.S (13 How.) 363, 371 (1852)). Justice Stevens stated the defendant's conduct was not particularly reprehensible in light of its legality in other jurisdictions. *Id.* The Court next weighed the ratio of actual or potential harm to the punitive award. *BMW*, 116 S. Ct. at 1601. The Court originally acknowledged the requirement of a reasonable relationship between actual harm suffered to punitive damages awarded in *TXO*. *Id.* (citing *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 459 (1993)). In light of this analysis, the Court noted that the punitive damages award of $2,000,000 was 500 times greater than the actual harm to Dr. Gore. *Id.* at 1602. Although the Court held that in most cases the ratio fell within an acceptable range, the discrepancy in this case was too severe. *Id.* at 1603. The Court also compared the civil penalty to any possible criminal penalties and noted that the maximum criminal penalty allowed in this situation was $2,000. *Id.*

and unconstitutional.[45]

B. Concurring Opinion

Justice Breyer concurred with the decision of the Court, but determined it was necessary to explain why the Court overcame the presumption of validity of the lower court's judgment.[46] The concurring Justice asserted that legal standards must offer some restraint upon arbitrary decisions of juries.[47] Justice Breyer concluded that the award in this case was a result of imperfect standards that did not restrain the jury and was, therefore, grossly excessive.[48]

C. Dissenting Opinion

Justice Scalia dissented to the majority opinion, stating that the Court's activities in the area of limiting punitive damages were "an unjustified incursion into the province of

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[45] *Id.* at 1604. The United States Supreme Court noted, however, that the factors examined in its decision were not the only criteria that lower courts may consider. *Id.* at 1595.

[46] *BMW*, 116 S. Ct. at 1604 (Breyer, J., concurring). Justice Breyer, with whom Justice O'Connor and Justice Souter joined, noted that members of the Court have generally held that similar procedures leading to this type of punitive damages award enjoy a presumption of validity where a court followed fair proceeding practices. *Id.* (Breyer, J., concurring) (citing *TXO*, 509 U.S. at 453).

[47] *Id.* at 1605 (Breyer, J., concurring). The concurring Justice stated that this constitutional concern arose out of the basic unfairness of arbitrarily depriving people of their property. *Id.* (Breyer, J., concurring) (citing Daniels v. West Virginia, 474 U.S. 327, 3361 (1986)). Justice Breyer determined that the standards applied by the Alabama Court here did not consist of the proper level of restraint. *Id.* (Breyer, J., concurring). Justice Breyer examined how the Alabama court interpreted the constraints in its statutory and case law, noting that the interpretation lacked any real ability to significantly protect defendants. *Id.* at 1605-09 (Breyer, J., concurring). Justice Breyer noted that the Alabama courts, in cases such as this, have applied a seven factor test when approaching the question of excessiveness. *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring)(citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)). The concurring Justice then stated that as the application of these principles by the Alabama court exemplified, the *Green Oil* factors imposed little, if any, constraint. *Id.* (Breyer, J., concurring).

[48] *Id.* at 1609 (Breyer, J., concurring). Considering together the reasoning behind the majority opinion and his own analysis, Justice Breyer determined that the award in this case was unconstitutional. *Id.* (Breyer, J., concurring).

state governments."[49] The dissenting Justice argued that as long as some judicial review for reasonableness existed, the court had furnished the defendant with all the due process the Fourteenth Amendment required.[50] Justice Scalia asserted precedential authority did not exist for giving the Supreme Court judgment priority over the decision of the state courts in these matters.[51] Justice Scalia concluded that the Court based its decision on improper authority and its lack of guidance would only mislead lower courts.[52]

D. Dissenting Opinion

Justice Ginsburg dissented, arguing the Court had improperly entered into an area of state domain.[53] Justice Ginsburg first argued that the Alabama Supreme Court had removed from the punitive damage award the calculation involving the defendant's conduct in other jurisdictions.[54] The dissenting Justice then noted that no Alabama authority ever

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[49] *Id.* at 1610 (Scalia, J., dissenting). Justice Scalia, with whom Justice Thomas joined, claimed that this case was merely the latest manifestation of the Court's recent concern with increasing amounts of punitive damages. *Id.* (Scalia, J., dissenting).

[50] *Id.* (Scalia, J., dissenting). Justice Scalia argued that the Fourteenth Amendment guaranteed procedural fairness, not substantive, fairness in the assessment of punitive damage awards. *Id.* (Scalia, J., dissenting) (citing *TXO*, 509 U.S. at 471).

[51] *BMW*, 116 S. Ct. at 1611 (Scalia, J., dissenting). The dissenting Justice also disagreed with the three legal guideposts established by the Court. *Id.* at 1614 (Scalia, J., dissenting). Justice Scalia claimed that the Opinion of the Court lacked guidance for legislatures and lower courts. *Id.* at 1612 (Scalia, J., dissenting). Justice Scalia did not find the three guideposts developed by the court exclusive or definitive. *Id.* at 1614 (Scalia, J., dissenting).

[52] *Id.* (Scalia, J., dissenting). Justice Scalia found that the development of this new federal-damages law provided no real solutions to the questions surrounding punitive damage review. *Id.* at 1613 (Scalia, J., dissenting).

[53] *Id.* at 1614 (Ginsburg, J., dissenting). Justice Ginsburg, with whom Chief Justice Rehnquist joined, urged the Court to avoid unnecessary intrusion into this area of state concern. *Id.* (Ginsburg, J., dissenting).

[54] *Id.* at 1615 (Ginsburg, J., dissenting). Justice Ginsburg noted that the Alabama Supreme Court declared that the jury could not use the number of similar acts of "misconduct" in other jurisdictions as a multiplier when calculating punitive damages. *Id.* at 1615 (Ginsburg, J., dissenting) (citing BMW of North America v. Gore, 646 So. 2d 619, 627 (Ala. 1994)).

suggested that such multiplication should be applied.[55] Justice Ginsburg concluded that subsequent actions of the Alabama Supreme Court and the Alabama legislature had made it unnecessary for the Court to intercede in this matter.[56]

III. DISCUSSION

A. Limitations on Punitive Damages

In *BMW of North America, Inc. v. Gore*, the United States Supreme Court solidified the idea that the Due Process Clause of the Fourteenth Amendment places a substantive limitation on punitive damage awards.[57] The Court's attempt to narrow the general reasonableness standard of earlier precedent yields a more definitive set of standards for analysis.[58] Defendants may now constitutionally challenge punitive damage awards with proof of a low level of reprehensibility of defendant's conduct, a high ratio of actual or potential damage to punitive recovery, and a vast difference between the maximum criminal penalty allowed and the punitive award.[59]

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[55] *Id.* (Ginsburg, J., dissenting). Justice Ginsburg then criticized the Court for so easily finding a constitutional problem when the highest court in Alabama had already corrected the error. *Id.* at 1616 (Ginsburg, J., dissenting). The dissenting Justice then argued that the decision of the Court concerning the excessive nature of the award created a new fact-finding element in appellate review, leading the Court further into state domain. *Id.* at 1616-17 (Ginsburg, J., dissenting).

[56] *BMW*, 116 S. Ct. at 1615 (Ginsburg, J., dissenting). Justice Ginsburg pointed put that many state legislatures had already passed legislation limiting punitive damage awards. *Id.* at 1618 (Ginsburg, J., dissenting). In light of the actions of the Alabama Supreme Court and the possible actions of its legislature, Justice Ginsburg argued that the Court should, yet again, wait until it decided upon this issue. *Id.* at 1615, 1618 (Ginsburg, J., dissenting).

[57] *See supra* notes 7, 44 and accompanying text. Critics had previously criticized the Court for its ambiguity on this issue. *See supra* notes 23, 34, 38 and accompanying text.

[58] *See supra* notes 29, 32, 38-39 and accompanying text. Courts have reviewed punitive damage awards based on a variety of standards: reasonableness; conduct of the defendant; lack of notice; mental state of the defendant; and, relationship to compensatory award. *See supra* text accompanying notes 11, 29, 38.

[59] *See supra* notes 43-44 and accompanying text. Defendants may also claim that the lower courts deviated from the constitutionally acceptable common-law procedures. *See supra* notes 25, 28, 32-33, 38, 42 and accompanying text.

B. Possible Effects and Considerations

Justice Ginsburg's dissent argued that the matter of punitive damage review should be left up to the states.[60] This argument begs the question of whether the Supreme Court in this case is acting under its constitutional mandate or as a mini-legislature enacting a judicial type of tort reform. This type of change, some would argue, is better left up to the states. However, the Supreme Court determined it will take the lead in this matter.

With the admission that there is no absolute formula for determining the constitutionality of punitive damage awards, the Court may just be inviting further criticism and arbitrary appellate decisions by not determining a hard line test. Considering these factors, the Supreme Court must determine whether it wants to set out an absolute definitive set of standards or leave the topic to the states for good.

IV. CONCLUSION

The *BMW* decision now makes clear that the Fourteenth Amendment does place substantive due process limitations on punitive damages awards. Although the Court has not fully enunciated the exact standards it will impose upon challenged punitive damage awards, it has laid a foundation for review. The final analysis is a type of balancing test, weighing the amount of the punitive damage award against the circumstances and factors surrounding each case.

Marcy L. Bryan

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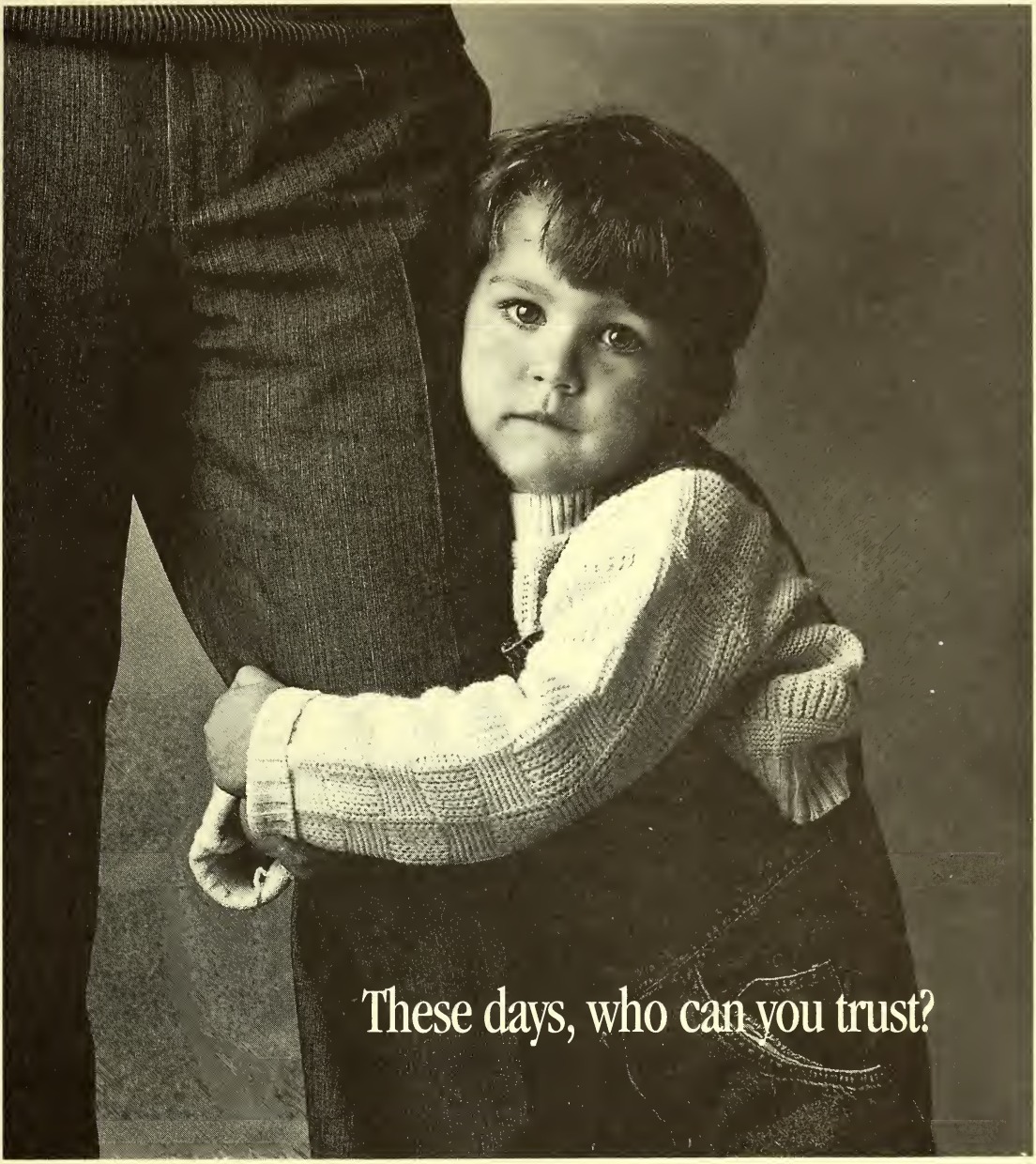
[60] *See supra* notes 53, 55-56 and accompanying text. Many state legislatures have enacted statutes which would limit the ability of juries to award large amounts in punitive damages. *See supra* note 56 and accompanying text.



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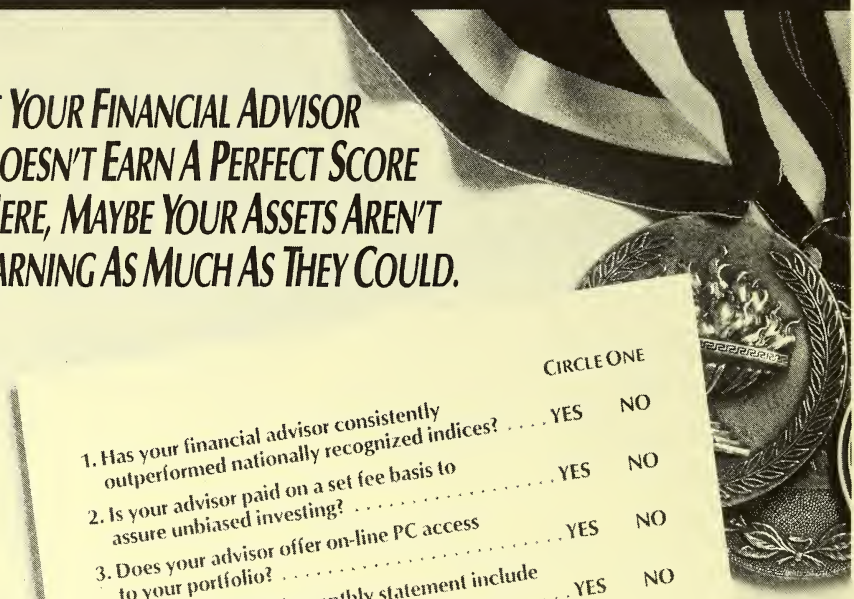

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